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# POLITICAL SCIENCE AND GOVERNMENT

BY

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## PREFACE

In writing of this book my aim has been primarily to provide students with a fairly comprehensive and up-to-date book on political science and government. It is hoped that the book in some degree serve also the needs of others who are interested in fundamental problems of the state and in the organization and functions of government.

The subject matter covered is divided into two parts. Part One deals with the nature, scope, and methods of political science and its relations to the allied or auxiliary sciences; the nature, constituent elements, and attributes of the state; nations and nationalities; theories concerning the nature of sovereignty; and the various forms and associations of states. Part Two concerned with forms and types of government; the elements of strength and weakness of the different forms; the principal theories that have been maintained in regard to the proper functions of government and the actual practice in the past and to-day; constitutions, their nature and types; the theories which have prevailed in the past relative to the nature of the suffrage, and the electorate as it is constituted to-day; and, finally, the constitution and rôle of the legislative, executive, and judicial organs of the more important states of the world. An attempt has been made to compare and evaluate the varying solutions reached in the different countries and to draw such conclusions as reason and experience seem to warrant.

The World War was followed by many fundamental changes in the governmental organization, especially of European states. Monarchies were transformed into republics or reorganized and made more democratic; rock-ribbed autocracies were overthrown and replaced by popular governments; long-established political unions were dissolved; powerful states were split into fragments and some of their parts erected into new states; new constitutions, with elaborate bills of rights proclaiming the sovereignty of the people and providing safeguards for individual liberty, took the place of those promulgated by kings or framed by aristocratically constituted assemblies. Nearly everywhere the suffrage was extended; in states where democracy was hardly

known before the World War, it was now made practically universal, direct, and equal for both men and women. The system of parliamentary responsible government, which had never gained a foothold in Germany during the existence of the monarchy and had been scorned as incompatible with German notions of government, was now introduced at a stroke, both in the Reich and in the individual states of which it is composed. Direct popular election of the president and democratic devices such as the initiative, the referendum, and the recall which before the War had been regarded as radical and dangerous, were also introduced. All together these changes constituted a remarkable transformation in the political organization of Europe, the principal facts of which I have endeavored to set forth in this book.

For a time it looked as though Europe, if not the world, had been made, in the language of President Wilson, "safe for democracy." But later, here and there in Europe, states deliberately turned their backs upon democracy and repudiated it as a failure. In Russia a dictatorship of the proletariat, founded on the very negation of the principle of democracy, is struggling to maintain itself, and to convince the rest of mankind that it is the most rational and efficient of all forms of government. In Italy a virtual dictatorship under Mussolini has existed since 1922 and early in 1933 a somewhat similar régime was established in Germany under the domination of Hitler.

The World War brought also widespread changes in the hitherto prevailing conceptions regarding the organization and functions of government. Political traditions long established and regarded as sacrosanct have been denounced as antiquated and out of harmony with modern conditions. Large numbers of persons have become radicals, in varying degree, and are attacking some of the most fundamental principles upon which the economic, social, and political structure of society has heretofore rested. Others, more moderate and respectable, are demanding changes in the existing system of legislative representation, political autonomy for the great economic, religious, and professional associations into which society is organized, the further extension of the functions of the state, more comprehensive systems of state insurance, on the theory that society should assume the risk for all injuries which its members suffer, and also other alleged reforms. It must be admitted that an increasing number of persons whose sym-

pathies and predispositions are distinctly democratic have lost, in some measure, their old-time faith in democracy and are asking themselves whether the claims of its founders and exponents are really justified by the results. Lord Bryce, himself an illustrious champion of the superiority of democratic government, did not conceal his pessimism, and men who share his skepticism are not lacking in America. But both he and they frankly confess that they cannot suggest anything better to take its place—at least nothing that would be acceptable to those to whom belongs in the final analysis the right to determine the form of government under which they are to live.

As to the question whether opinions now widely held are sound or unsound in principle and whether the remedies proposed would remove the evils complained of, there is, naturally, much controversy. Whatever the facts as to this may be, all must admit that never before, perhaps, was there more urgent need for sound political and economic thinking in all countries where the ultimate power of decision rests with the people. It is important, therefore, that those upon whose shoulders will devolve, in time, the task of determining these questions, and especially the students in the colleges and universities, who, it may be assumed, will be leaders of thought and opinion in their respective communities, should be qualified to distinguish between political and economic theories which are sound and practicable and those which are not; between institutions which are genuine and those which are spurious; and between policies which would produce economic and social justice to all classes and those which would result in unequal justice. It is believed that this capacity may be acquired, in some degree at least, from the study of political science as it has been expounded by the great text writers of the past and especially from the study of the history and the practice of governments and the results of experience as they are recorded in political treatises.

I shall be happy if this book, which is presented as a modest storehouse of information on these matters, should prove helpful to students in evaluating the merits of different systems of government and of the theories which have been propounded in regard to the proper organization and functions of government.

For the benefit of those who may wish to pursue their studies of particular subjects beyond the necessarily limited discussion contained

in this book, I have provided at the head of each chapter a select bibliography of the best literature dealing with the subject treated therein, and in footnotes I have cited in considerable abundance other sources of information.

In parts of this book I have incorporated, usually with some changes, certain portions of my earlier treatise "Introduction to Political Science." I am indebted to my colleague, Professor John A. Fairlie, for having read several of the chapters and for having given me the benefit of his wise criticism.

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# PART I. POLITICAL SCIENCE

## CHAPTER I

### NATURE AND SCOPE OF POLITICAL SCIENCE

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#### I. TERMINOLOGY

**Lack of a Precise Nomenclature.**—It is characteristic of political science that, differing from the natural sciences, it lacks a

precise and generally accepted nomenclature. Such terms as "state," "government," "politics," "administration," "nation," "nationality," "liberty," "democracy," "oligarchy," "people," and many others are used in different senses and convey different meanings to different persons. Frequently they have both a technical or scientific and a popular meaning, each differing from the other though used without discrimination. This is regrettable because it often leads to confusion and misunderstanding, such as one does not encounter in the literature of the natural sciences, where the terminology employed is more precise and exact.<sup>1</sup> Sheldon Amos remarked that some of the terms employed, having a double meaning and being capable of a favorable or unfavorable use, are sometimes distorted by writers and speakers and used for the purpose of subserving a momentary or special interest or for supporting a particular thesis.<sup>2</sup>

**The Terms "Politics" and "Political Science."**—What was said above in regard to the ambiguity of the terminology of political science is illustrated by the use of the term "politics" (derived from the Greek words *polis* and *politeia*), which is defined in the dictionaries and textbooks as both an art and a science and is used by text writers in both senses.<sup>3</sup> The obvious objection to the employment of the term in this dual sense could be removed by restricting its use to describe the activities by which public officials are chosen and political policies promoted, or, in a wider sense, the sum total of the activities which have to do with the actual administration of public affairs; reserving the term "political science" to describe the body of knowledge relating to the phenomena of the state. Careful writers, of whom the Germans are the most representative, have generally observed this distinction. They distinguish between the terms *Politik*, *Staatspraxis*, and *Staatskunst*, on the one hand, and *Staatswissenschaft* and *Staatslehre* on

<sup>1</sup> Jellinek remarked that there is no science which is so much in need of a good terminology as is political science; "Recht des modernen Staates," p. 129. Compare also Willoughby, "The Fundamental Concepts of Public Law," p. 19; Bryce, "Modern Democracies," vol. I, p. 15; and Fairlie, "Politics and Science," *The Scientific Monthly*, vol. XVIII, p. 33. Compare also the remark of President Lowell, that the study of politics "lacks the first essential of a modern science—a nomenclature incomprehensible to educated men." *American Political Science Review* vol. IV, p. 1.

<sup>2</sup> "The Science of Politics," p. 2.

<sup>3</sup> Gilchrist ("Principles of Political Science," p. 2) justly remarks that the term "politics" when used in its original Greek sense is unobjectionable, but since modern usage has given it a new meaning it is useless as a scientific term.

the other. Thus Bluntschli, in his treatise "Theory of the State,"<sup>4</sup> says, "politics" (*Politik*) is more of an art than a science and has to do with the practical conduct or guidance of the state, whereas "political science" (*Staatswissenschaft*) is concerned with the foundations of the state, its essential nature, its forms or manifestations, and its development.<sup>5</sup> Other writers, such as Bryce and Seeley in England and Burgess and Willoughby in the United States, have observed this distinction and have employed the term "political science" rather than "politics" in their treatises dealing with the origin, nature, organization, and sphere of the state.

**The Terms "Theoretical" and "Applied" Politics.**—Some writers, who apparently hesitate to admit that the study of the phenomena of the state is properly a science and who therefore regard with skepticism the term "political science," have nevertheless recognized the validity of the distinction referred to above by distinguishing between "theoretical" and "practical" (or "applied") politics, the former term being employed when referring to the fundamental characteristics of the state without reference to its activities or the means by which its ends are attained; the latter when referring to the state in action, that is, considered as a dynamic institution.<sup>6</sup> Thus everything that relates

<sup>4</sup> Pages 1, 3.

<sup>5</sup> A goodly num'ber of German, English, and American writers, however, employ the term "politics" in preference to the term "political science"; for example, Jellinek, Holtzendorff, Treitschke, Waitz, and Sidgwick. As to the distinction between "politics" as an art and "politics" as a science see Bluntschli, "Politik" (vol. III of his "Lehre vom modernen Staat"), pp. 1-6; Holtzendorff, "Principien der Politik" chs. 2-3; Von Mohl, "Encyclopädie der Staatswissenschaften," p. 543; Treitschke, "Politics" (Eng. trans. by Dugdale and Torben de Bille, 1916), introductory chapter; Jellinek, *op. cit.*, p. 13; and Rehm, "Allgemeine Staatslehre," pp. 9-10. Willoughby ("The Fundamental Concepts of Public Law," p. 7) distinguishes between the science and the art of politics. The science of politics, he says, seeks an accurate description and classification of political institutions and the precise determination of the forces which create and control them, while the art of politics has for its aim the determination of the principles which it is necessary to observe if political institutions are to be efficiently operated. A singular use of the term "politics" is made by Goodnow in his work entitled "Politics and Administration," where it is employed to denote the activities of the state which have to do with the expression of the state will, in contradistinction to the term "administration," which is concerned with the execution of the state will.

<sup>6</sup> The distinction between "theoretical" and "applied" politics has been observed by Jellinek, Holtzendorff, Janet, Cornwall Lewis, Alexander Bain, Sir Frederick Pollock, and others.

to the origin, nature, attributes, and ends of the state, including the principles of political organization and administration, falls within the domain of "theoretical" politics, while that which is concerned with the actual administration of the affairs of government belongs to the sphere of "applied" or "practical" politics. The majority of writers to-day, however, prefer the term "political science" instead of "theoretical politics"; and the simple term "politics" instead of "applied politics" or "practical politics." Some writers<sup>7</sup> employ the term "science of politics"; others, the "theory of the state," like the *Staatslehre* of the Germans, because, as one author remarks, "it gives a clearer idea of the wide nature of the field of inquiry" and at the same time "avoids the necessity of a delicate and intricate discussion as to whether the study of politics is a science or a philosophy."<sup>8</sup> In spite of all objections, however, the term "political science" (*Staatswissenschaft, science politique, scienza politica*) has come to be more generally employed by the best writers and thinkers to describe the mass of knowledge derived from the systematic study of the state, while the meaning of the term "politics" is confined to that of the business or activity which has to do with the actual conduct of affairs of state.<sup>9</sup>

**The Political Sciences.**—Against the single term "political science" the objection has been urged that it does not correspond with the facts, since there is no single science dealing with the state, but rather a group of related sciences, each concerned with particular aspects of it. Thus, it is said, the modern state is a very complex organization which presents itself under divers aspects and is capable of being studied from many different points of view. The mass of knowledge relating to each phase or aspect of the state has developed

<sup>7</sup> For example, Amos, Bagehot, and Pollock.

<sup>8</sup> McKechnie defends the use of this term. He criticizes the use of the term "political science" for the reason that it "often conveys the idea that it is merely a study to be entered upon as a means to party ends, not as a resolute endeavor to find truth for its own sake." The term "science of politics" he finds equally objectionable for the reason that the term "science" is associated with logical and rigorous methods of investigation and experiment applied to such objects as the, are adapted to, while the word "politics" is associated with all that is changeable and contingent in the affairs of a nation, rather than with the principles of absolute and universal truth. "The State and the Individual," pp. 29-30.

<sup>9</sup> On the use of technical terms in political science see Lewis, "Methods of Observation and Reasoning in Politics," vol. I, ch. 4.

a history and a dogma of its own quite distinct from the rest. The phenomena of each have become so numerous and complex as to create a necessity for special treatment by the investigator. Thus the tendency has been to group them into separate categories and treat them as distinct sciences.<sup>10</sup> The plural form, the "political sciences," therefore seems to correspond more nearly with the facts and is preferred by many writers, especially the French, who commonly speak of the *sciences morales et politiques*.<sup>11</sup>

According to the latter view a political science is one which is concerned, not necessarily with the state in all of its aspects or relations, but with any particular phenomenon of the state or any class of phenomena either as a whole or incidentally, directly or indirectly. Thus there may be as many political sciences as there are conceivable aspects or forms of manifestation of the state. In this sense sociology, political economy, public finance, public law, diplomacy, constitutional history, may be denominated political sciences, since they all deal either primarily or incidentally with some class of phenomena belonging to the state.<sup>12</sup> Those who maintain that the singular form accords more

<sup>10</sup> Compare as to this Dunning, "Political Theories, Ancient and Medieval," p. xxi; Giddings, "Principles of Sociology," ch. 2; and Gilchrist, "Principles of Political Science," p. 1. The last-named writer observes that the science with which we are here concerned has really developed into a number of independent sciences and that it is impossible to draw absolute lines of demarcation between them. "Whenever," says Giddings, "phenomena belonging to a single class, and therefore properly the subject matter of a single science, are so numerous and complicated that no one investigator can hope to become acquainted with them all, they will be divided up among many particular sciences." *Op. cit.*, p. 31. This, he asserts, is what has happened in the case of the study of the phenomena of the state. Dunning likewise remarks that the so called "branches" of political science have "sloughed off and expanded until each has a history and a dogma quite too comprehensive for any but special treatment." *Op. cit.*, p. xxii.

<sup>11</sup> Compare Du Sablon, "L'Unité de la Science" (1910). Among those who have defended the plural term may be mentioned Von Mohl, Holtzendorff, Lewis, Dunning, and Giddings. Von Mohl, in his "Geschichte und Litteratur der Staatswissenschaften," published in 1855, vol. I, p. 126, classified the "political sciences" as (1) general political theory (*Allgemeine Staatslehre*); (2) the dogmatic political sciences, including public law, political ethics, and the art of politics (*Staatskunst*), including diplomacy, administration, etc.; and (3) the historical political sciences, including constitutional history and statistics.

<sup>12</sup> Giddings even enumerates philosophy as one of the "political sciences." *Op. cit.*, p. 27. See also his "Province of Sociology," in the *Annals of the American Academy of Political and Social Science*, vol. I, p. 66. In some of the Scotch universities today the professor of philosophy is also professor of political science.

nearly with the facts argue that in reality the above-mentioned sciences are rather coördinate social sciences than independent political sciences. Thus, says one writer, in support of this view, "The various relations in which the state may be conceived may be sub-divided and treated separately, but their connection is too intimate and their purpose too similar to justify their erection into different sciences."<sup>13</sup> Without attempting to pass judgment upon the respective merits of the two views, it is safe to say that either form may be justified by distinguishing between political science in its strict sense, that is, the science which deals exclusively with the phenomena of the state, and political science in the wider sense as embracing all the sciences which deal with particular aspects of state life, such as sociology, history, economics, and others. When used in the former sense, the singular form should be employed; when used in the latter sense, the plural is justifiable.<sup>14</sup>

## II. DEFINITION AND SCOPE

**Views of Eminent Authors.**—It was a saying of a Roman jurist that all definitions are dangerous because they never go far enough and are nearly always contradicted by the facts. The truth of this observation applies as well to general propositions in political science as to those of the civil law. Nevertheless, it is equally true, as has been well said by a noted political writer, that "to obtain clear and precise definitions of the leading terms is an important achievement in all departments of scientific inquiry."<sup>15</sup> The renowned Swiss scholar Bluntschli defined political science (*Staatswissenschaft*) as "the science which is concerned with the state, which endeavors to understand and comprehend the state in its fundamental conditions, in its essential nature, its various forms of manifestation, its development."<sup>16</sup> Gareis,

<sup>13</sup> Munroe Smith, "The Domain of Political Science," in the *Political Science Quarterly*, vol. I, p. 5. Among others who have preferred the use of the singular term may be mentioned Burgess, Jellinek, Lieber, Sidgwick, Seeley, and Willoughby.

<sup>14</sup> See Jellinek (*op. cit.*, pp. 5-6), who points out the necessity of distinguishing between the science of the state in the larger sense of the word and the sciences of the state in a stricter sense which may be designated as disciplines. See also Von Mayr ("Begriff und Gliederung der Staatswissenschaft").

<sup>15</sup> Sidgwick, "Elements of Politics," p. 19. Compare also Bain, "Deductive and Inductive Logic," p. 547, and Rehm, "Allgemeine Staatslehre," p. 1.

<sup>16</sup> "Allgemeine Staatslehre," being vol. I of his "Lehre vom modernen Staat," p. 16. Compare also Holtzendorff, "Principien der Politik," p. 10.

a German writer said, "Political science considers the state, as an institution of power (*Machtwesen*), in the totality of its relations, its origin, its setting (land and people), its object, its ethical signification, its economic problems, its life conditions, its financial sides, its end, etc."<sup>17</sup> Jellinek, one of the ablest of European publicists, distinguished between theoretical political science (*theoretische Staatswissenschaft oder Staatslehre*) and applied political science (*angewandte oder praktische Staatswissenschaft*). Theoretical political science was again subdivided by Jellinek into the general theory of the state (*allgemeine Staatslehre*) and special or particular theory of the state (*besondere Staatslehre*). The former has for its purpose the study of fundamental principles. It considers the state in itself and the elements which constitute it; not the phenomena of a particular state, but the totality of all the historico-social aspects in which the state manifests itself. Furthermore, the dual nature of the state, that is, its character both as a social phenomenon and a legal or juridical institution, furnishes the basis for still another distinction, to wit, that between the social doctrine of the state (*soziale Staatslehre*) and the theory of constitutional law (*Staatsrechtslehre*). The former deals with the state primarily as a social organization, that is, as a society of individuals organized for common ends; the latter, with the state as a concept of public law, a juristic entity or legal phenomenon.<sup>18</sup>

A succinct definition is that of Paul Janet, a distinguished French writer, who conceived political science to be "that part of social science which treats of the foundations of the state and the principles of government."<sup>19</sup> According to Seeley, "political science investigates the phenomena of government as political economy deals with wealth, biology with life, algebra with numbers, and geometry with space and magnitude."<sup>20</sup> Seeley pointed out that as most of the commonwealths of antiquity were city states, ancient political science was little more

<sup>17</sup> "Allgemeine Staatslehre," in Marquardsen's "Handbuch des öffentlichen Rechts," vol. I, p. 1.

<sup>18</sup> *Op. cit.*, pp. 9-13.

<sup>19</sup> "Politique," in Block's "Dictionnaire de la politique," vol. II, p. 577.

<sup>20</sup> "Introduction to Political Science," pp. 18, 37. Compare Goodnow, who defines political science simply as the science which treats of the organization known as the state. It is, he says, a science of both statics and dynamics, of the state at rest and of the state in action. *Proceedings of the American Political Science Association*, vol. I, p. 37.

than the science of municipal government, a truth which finds illustration in Aristotle's treatise on "Politics," a work practically limited in its scope to the consideration of such polities only as were city states. Modern political science, on the other hand, is, as has been well said, the science of the national country state and is tending to become the science of the world state. According to Professor Burgess, the modern requirements of territorial expansion, representative government, and national unity have made political science not only the science of liberty but also the science of sovereignty.<sup>21</sup>

**Points of Agreement.**—All of the opinions quoted above are in substantial agreement on the essential point, namely, that the phenomena of the state in its varied aspects and relationships, as distinct from the family, the tribe, the nation, and from all private associations or groups, though not unconnected with them, constitute the subject of political science. In short, political science begins and ends with the state. In a general way its fundamental problems include, first, an investigation of the origin and nature of the state; second, an inquiry into the nature, history, and forms of political institutions; and third, a deduction therefrom, so far as possible, of the laws of political growth and development.<sup>22</sup> In the process of evolution the appearance of new political conditions may give rise to new problems, but upon close analysis they will be seen to be problems of practical politics rather than fundamental problems of political science.<sup>23</sup>

<sup>21</sup> "Relation of Political Science to History" in *Report of the American Historical Association* (1896), vol. I, p. 206. For another view, that liberty is one of the "chief subjects" of political science, see Lieber, "Civil Liberty and Self-Government," p. 44: also his "Political Ethics," vol. I, bk. II, ch. 13. Willoughby ("Fundamental Concepts of Public Law," p. 3) says political science is the science which has for its object the ascertainment of political facts and the arrangement of them in systematic order as determined by the logical and causal relations which exist between them. These facts, he adds, include both objective phenomena and the subjective forces which create them or fix their functional activities.

<sup>22</sup> "The task of political science," says Jellinek, "is to study in their fundamental relations the public powers, to examine the conditions under which they manifest themselves, their end, and their effect, and to investigate the state in its inner nature." "Recht des modernen Staates," pp. 9-10.

<sup>23</sup> Treitschke, who treats "politics" as both an art and a science, thus states the problem of political science: "First, it should aim to determine from a consideration of the actual world of states the fundamental idea of the state: second, it should consider historically what the people have chosen, what they have created, and what they have attained in political life, and how; and, third, through this means, it should determine historical laws and moral imperatives. As such it is

**Political Philosophy.**—The distinction between political science (*Staatswissenschaft*) and political theory or political philosophy (*Staatslehre*, *Staatsphilosophie*) is generally observed by the more systematic writers on the state, though a precise demarcation of the boundary lines which separate them is difficult, if not impossible. Political philosophy is said to be concerned with a theoretical or speculative consideration of the fundamental principles and essential characteristics of the materials and phenomena with which political science has to deal. It investigates the development of political thought, and inquires into the foundations of political authority; it analyzes, classifies, and forms judgments upon the essential attributes of the state and thereby prepares the way for a true political science. It is concerned rather with generalizations than with particulars, and predicates essential qualities rather than accidental or unessential characteristics.<sup>24</sup> Again, it is said that while political science furnishes us with the results of logical thinking upon the nature and forms of concrete political institutions, political philosophy inquires into the foundations

"applied history." "Politics," Eng. trans. by Dugdale and Torben de Bille, vol. I., p. xxvii. Cf. also Willoughby, "The Nature of the State," p. 382. "Generally speaking," says Willoughby, "there are three great topics with which political science has to deal: state, government, law." "Political Science, as a University Study," *Seaview Review*, July, 1906, p. 258. Sidgwick divides the problems of political science into two general divisions: those relating to the organization of the state and those relating to its function. "Elements of Politics," p. 12. Professor Fairlie (article "Politics and Science," *Scientific Monthly*, vol. XVIII, p. 23) says political science deals "with the life of men as organized under government and law, in what is known as the state. It includes a study of the organization and the activities of states, and of the principles and ideals which underlie political organization and activities. It considers the problems of adjusting political authority to individual liberty, the relations among men which are controlled by the state, and the relations of men to the state. It also deals with the distribution of governing power among the several agencies by which the actions of the state are determined, expressed, and exercised, and with the problem of international life."

<sup>24</sup> Willoughby, "Political Philosophy," in *South Atlantic Quarterly*, vol. V, p. 161; also an article by the same author entitled "The Value of Political Philosophy," in the *Political Science Quarterly* for March, 1900; and his "Fundamental Concepts of Public Law," p. 8. See also Dunning, "Ancient and Medieval Political Theories," p. xvii. The distinction between *Staatslehre* and *Staatswissenschaft* is dwelt upon and explained by Rehm in his "Allgemeine Staatslehre," p. 1, and by Schmidt in his "Grundzüge der praktischen Politik," pp. 1-3. Gilchrist ("Principles of Political Science," p. 4) remarks that political philosophy is in a sense prior to political science since the fundamental assumptions of the former are the bases of the latter.

than the science of municipal government, a truth which finds illustration in Aristotle's treatise on "Politics," a work practically limited in its scope to the consideration of such polities only as were city states. Modern political science, on the other hand, is, as has been well said, the science of the national country state and is tending to become the science of the world state. According to Professor Burgess, the modern requirements of territorial expansion, representative government, and national unity have made political science not only the science of liberty but also the science of sovereignty.<sup>21</sup>

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<sup>22</sup> "The task of political science," says Jellinek, "is to study in their fundamental relations the public powers, to examine the conditions under which they manifest themselves, their end, and their effect, and to investigate the state in its inner nature." "Recht des modernen Staates," pp. 9-10.

<sup>23</sup> Treitschke, who treats "politics" as both an art and a science, thus states the problem of political science: "First, it should aim to determine from a consideration of the actual world of states the fundamental idea of the state; second, it should consider historically what the people have chosen, what they have created, and what they have attained in political life, and how; and, third, through this means, it should determine historical laws and moral imperatives. As such it is

**The Affirmative View.**—For our purpose a science may be described as a fairly unified mass of knowledge relating to a particular subject, acquired by systematic observation, experience, or study, the facts of which have been coördinated, systematized, and classified.<sup>29</sup> The scientific method of examining facts is not peculiar to one class of phenomena or to one class of investigators; it is applicable to social as well as to physical phenomena, and we may safely reject the claim that the scientific frame of mind belongs exclusively to the physicist or the naturalist.

It is, of course, true that political science is not and never will be an exact science in the sense that mechanics, chemistry, and physics are, since its laws and conclusions cannot be expressed in the same precise terms nor can results be predicted with anything like the same accuracy. But there are also inexact natural sciences, like meteorology, whose data at any moment are too completely unknown to admit of accurate prediction. The late Lord Bryce in his address as president of the American Political Science Association (1909) maintained that politics is a science in somewhat the same sense as meteorology is. It is, he said, a science in the sense that "there is a constancy and uniformity in the tendencies of human nature which enable us to regard the acts of men at one time as due to the same causes which have governed their acts at previous times. Acts can be grouped and connected, can be arranged and studied as being the results of the same generally operative tendencies." Politics, he added, is not a

*Amer. Pol. Sci. Assoc.*, vol. II, 1905, p. 198) declared that the "idea of determining state policy upon scientific principles has no place in practical politics," yet he added that "it is hardly too much to say that political science transcends all other branches of science in practical value, for it deals with the conditions underlying them, all art and science having their seat within the bounds of polity."

<sup>29</sup> Compare the definition of "Science" in the Century Dictionary; see also Lieber, "Political Ethics," vol. I, p. 17. "The classification of facts and the formation of absolute judgments upon the basis of this classification," says Pearson, in his "Grammar of Science," p. 6, "essentially sum up the aim and method of modern science." Again, he says, "the classification of facts, the recognition of their sequence and relative significance, is the function of science." Compare also Thomson ("Introduction to Science," pp. 79-80), who remarks that the function of science is the ascertainment, registration, and classification of facts and that science includes "all knowledge, communicable and verifiable, which is reached by methodical observation and experiment and which admits of concise, consistent, and connected formulation"—a definition which is probably as satisfactory as any brief formulation can be.

deductive science but an experimental science, which, though it cannot try experiments, can study them and note results ; it is also a progressive science, since every year's experience adds not only to our materials but to our comprehension of the laws that govern human society.<sup>30</sup> Authorities are now generally agreed that the phenomena of the state present a certain connection or sequence which is the result of fixed laws, though less constant, to be sure, than those of the physical world ; that these phenomena form proper subjects of scientific investigation ; and that the laws and principles deducible therefrom are susceptible of application to the solution of concrete problems of the state.<sup>31</sup> All that is required to give a scientific character to the study of political phenomena is that the inquiry shall be conducted in accordance with a definite plan or system, with due regard to the relations of cause and effect, so far as they are ascertainable, and in conformity with certain well-recognized rules of scientific investigation.<sup>32</sup>

The consensus of scientific opinion is in favor of this view. Aristotle described "politics" as the master science in the highest sense,<sup>33</sup> and in practice he applied scientific methods to his study of Greek polities. So did Bodin, Hobbes, and Montesquieu in later times, and Cornwall Lewis, Sidgwick, Bryce, Bluntschli, Jellinek, and many others in our own day. German scholars have done more, perhaps, than any others by their profound researches and discriminating analytical methods, to give to politics the character of a science. Holtzendorff defended the claim of politics to be ranked as a science.

<sup>30</sup> "The Relations of Political Science to History and to Practice," *Amer. Pol. Sci. Rev.* (1909), vol. III, pp. 1-3. See also his "Modern Democracies" (1921) vol. I, ch. 2. Compare also Shepard (in Barnes, "History and Prospects of the Social Sciences," p. 427), who considers that the scientific method can be resolved into three processes : first, the accumulation of facts ; second, the linking of these together in causal sequences ; and third, the generalization from the latter of fundamental principles or laws. As yet, he thinks, political science has not progressed beyond the second stage, but the progress made in the last generation justifies the belief that within the next half century it will attain the dignity of a true science.

<sup>31</sup> Compare as to this, J. S. Mill, "System of Logic," p. 549.

<sup>32</sup> "Whether there is a 'political science,'" said Huxley, "depends on whether any rational principles can be found to regulate the form of constitutions, the determination of the sphere of the state, which make a complete and systematized branch of knowledge, clearly formulated and understood in their mutual relations."

<sup>33</sup> "Ethics," bk. I, ch. 11.

"With the enormous growth of knowledge," he said, "it is impossible to deny that the sum total of all the experiences, phenomena, and knowledge respecting the state may be brought together under the collective title of political science" (*Staatswissenschaft*).<sup>34</sup> This is the view of Von Mohl, Bluntschli, Jellinek, Ratzenhofer, Treitschke, Sir G. C. Lewis, Sidgwick, Lieber, Woolsey, Burgess, Willoughby, and other systematic writers on the state. "*Il y a donc une science de l'état,*" says Janet, "*non pas de tel ou tel état en particulier, mais de l'état en général considéré dans sa nature, ses lois, et dans ses principales formes.*"<sup>35</sup> We must conclude, therefore, that the weight of authority justifies the claim of politics to the rank of a true science. It renders practical service by deducing sound principles as a basis for wise political action and by exposing the teachings of a false political philosophy.<sup>36</sup> As a science it falls short, of course, of the degree of perfection attained by the physical sciences, for the reason that the facts with which it deals are more complex and the causes which influence social and practical phenomena are more difficult of control and are perpetually undergoing change.<sup>37</sup> As yet it is still probably the most incomplete and undeveloped of all the social sciences.<sup>38</sup>

<sup>34</sup> "Principien der Politik" p. 4.

<sup>35</sup> "Histoire de la science politique," etc., vol. I, p. lxxv.

<sup>36</sup> "Thus," says Sir Frederick Pollock, "political science must and does exist, if it were only for the refutation of absurd political theories and projects." "History of the Science of Politics," p. 4.

<sup>37</sup> Compare Mill, "System of Logic," p. 549.

<sup>38</sup> Buckle, in his "History of Civilization," written in 1857, declared that "in the present state of knowledge, politics so far from being a science, is one of the most backward of all the arts" (vol. I, p. 361). Buckle, however, did not deny the possibility of a political science; what he lamented was that so little attention had been given to the study of the state, that as a systematic branch of knowledge it was too crude and undeveloped to be considered as a science. Of the same opinion was Mill, who wrote in 1843, "It is accordingly but of yesterday that the concept of a political or social science has existed anywhere but in the mind of here and there an isolated thinker, generally very ill prepared for the realization." "System of Logic," p. 547. At the end of the eighteenth century political science was probably further advanced than the physical and biological sciences. But with the marvelous development of the latter sciences in the nineteenth century the social sciences have relatively lost ground. Fairlie, "Politics and Science," *Scientific Monthly*, vol. XVIII, p. 21. See Shepard, in Barnes, "History and Prospects of the Social Sciences" (1925), pp. 425 ff.; and Merriam, "The Present State of the Study of Politics," *Amer. Pol. Sci. Rev.*, vol. XV (1921), pp. 173 ff.

## CHAPTER II

### METHODS OF POLITICAL SCIENCE

#### Selected References

- BLUNTSCHLI, "Theory of the State," Introd., ch. 2.  
BRYCE, "Modern Democracies" (1921), vol. I, ch. 2; also his presidential address before the American Political Science Association, "Relations of Political Science to History," *American Political Science Review*, vol. III (1904), pp. 1 ff.  
CATLIN, "The Science and Method of Politics" (1927), pt. I, ch. 3.  
JELLINEK, "Recht des modernen Staates" (1905), bk. I, ch. 2.  
LEWIS, "Methods of Observation and Reasoning in Politics" (1842), vol. I, chs. 5-6.  
LOWELL, presidential address : "The Physiology of Politics," *Amer. Pol. Sci. Rev.*, vol. IV (1910), pp. 1-16.  
MILL, "System of Logic" (8th ed., 1906), bk. VI, chs. 6-10.  
SEELEY, "Introduction to Political Science" (1896), Lecture II.

**Limitations and Difficulties.**—Having endeavored to show that the study of political phenomena may under certain conditions attain the character of a science, we come now to inquire into the processes and methods by which this may be done. First of all, however, we must note the limitations and difficulties under which scientific investigation of political phenomena must of necessity be conducted. The material with which the political scientist has to deal is very different from that with which the investigator in the physical sciences is concerned, being of such a character as not to permit of the use of artificial contrivances or apparatus for increasing or guiding his powers of observation or for registering results. Not only must the investigator work without the assistance of mechanical aids, but he is handicapped by the fact that the phenomena with which political science deals do not follow one another according to invariable laws of sequence, but rather at indeterminate intervals, constituting, as a noted writer observed, an "interminable and perpetually varying series."<sup>1</sup> There is an essential difference between physical and social phenomena. As

<sup>1</sup> George Cornwall Lewis, "Methods of Observation and Reasoning in Politics," vol. I, p. 121.

has been said, the subject matter with which the political scientist has to deal, unlike that with which the physicist deals, includes an "ideal dimension," for political institutions are constantly changing and the changes are not due solely to the influence of objective conditions.<sup>2</sup> The facts of history and social life cannot be reproduced at our volition and made the subject of experiment with a view to determining what is best under a given set of circumstances. Social facts never recur at regular intervals as the manifestations of general laws, but rather as the actions of individuals or groups. The facts of natural science are susceptible of evaluation; they are governed by uniform and invariable laws. Each particle of matter is identical with every other of its own kind. An atom of carbon or a molecule of carbonic acid is not different from any other atom or molecule, but the units of the social organism may differ infinitely from one another.

The necessity of sound scientific methods in the study of social and political phenomena is probably greater than it is in the physical sciences, where the investigator has the aid of mechanical apparatus. In this connection, it has been well said that what the microscope is to biology, or the telescope to astronomy, a scientific method is to the social sciences.<sup>3</sup> The investigator should, therefore, be on his guard against pseudo methods and not be misled by the methodological "fads," the exploitation of which has become one of the tendencies of the present day. He would do well to keep in mind the fact that the spirit and method of all true science is inductive and pragmatic, not deductive and dogmatic. It is also positive; that is, it rejects all *a priori* arguments, purely abstract ideas, and absolute standards, and builds conclusions upon the accumulated experience of the past, as modified by the changing conditions and circumstances of the present.<sup>4</sup>

### **Writers on Methodology.—**Not until the nineteenth century

<sup>2</sup> Sabine and Shepard, introduction to their translation of Krabbe, "Modern Idea of the State," p. xii.

<sup>3</sup> Ellwood, "The Present Condition of the Social Sciences," *Science*, November 16, 1917, p. 471.

<sup>4</sup> Compare Vaughan, "History of Political Philosophy" (1925), Vol. II, p. 200; also Jellinek (*op. cit.*, bk. I, ch. 2), who pointed out that many of the best writers on the methodology of political science have not seemed to be conscious of the difficulties and of the errors into which they are in danger of falling through the confusion of analogies with truth.

did the phenomena of the state come to be generally regarded as a proper field for scientific investigation, since which time the literature of the subject has been enriched by the investigations of many scholars. Among those who have made special contributions to the methodology of political science, Auguste Comte, John Stuart Mill, Alexander Bain, Sir George Cornwall Lewis, and Lord Bryce deserve particular mention. Comte conceived the principal methods for the scientific study of social phenomena to be three in number, namely, observation, experiment, and comparison.<sup>5</sup> Mill recognized four methods: the chemical or experimental, the geometrical or abstract, the physical or concrete deductive, and the historical method, the first two of which he considered to be false methods, the last two, the true ones.<sup>6</sup> Bluntschli considered the true methods of political investigation to be the philosophical and the historical.<sup>7</sup> A recent French writer who has devoted a volume to the subject of methodology in political science recognizes six possible lines of investigation: first, the sociological; second, the comparative; third, the dogmatic; fourth, the juridical; fifth, the method of good sense (*du bon sens*); and, sixth, the historical.<sup>8</sup>

**The Experimental Method.**—The claim of the experimental method to a rightful place in the methodology of political science has been denied because, it is said, the nature of society is such that it cannot very well be made an object of artificial experimentation. "We cannot," said Sir George C. Lewis, "treat the body politic as a *corpus vile* and vary its circumstances at our pleasure for the sake only of ascertaining abstract truth. We cannot do in politics what the experimenter does in chemistry. We cannot try how the substance is

<sup>5</sup> "Positive Philosophy" (tr. by Martineau), vol. II, pp. 79-91. Comte conceived an ultimate fourth method, the historical, to be applied only in the investigation of the most complex social phenomena. See the analysis and criticism of Comte's classification of methods in Vaughan, *op. cit.*, vol. II, pp. 201 ff. Compare also McKenzie, "Introduction to Social Philosophy," p. 14.

<sup>6</sup> "System of Logic," pp. 550-587.

<sup>7</sup> "Theory of the State," ch. 2. Bluntschli contrasted the historical and philosophical with the ideological and empirical methods, the latter of which he pronounced one-sided and false. He insisted that the true philosophical method is not one of abstract speculation as is commonly supposed. Among the writers who have followed the philosophical method may be mentioned Kent, Hegel, Bosanquet, and T. H. Green. Their theories of the state are discussed in ch. V. (*infra*).

<sup>8</sup> Deslandres, "La crise de la science politique et le problème de la méthode."

affected by change of temperature, by dissolution in liquids, by combination with other chemical agents, and the like. We cannot take a portion of the community in our hands as the king of Brobdingnag took Gulliver, view it in different aspects and place it in different positions in order to solve social problems and satisfy our speculative curiosity.<sup>9</sup> If the chemist wishes to study the effect of a combination of certain substances, he can create by artificial processes conditions favorable to the investigation and exclude disturbing agencies. He may isolate the phenomenon with which he deals and expose it to certain selected influences, leaving the surrounding medium unchanged. But if the political scientist wishes to experiment with democracy, for instance, he cannot select a state at will, introduce his democracy, and wait for determinate results.<sup>10</sup> He will find himself powerless to exclude extraneous influences, such, for example, as famines, commercial crises, insurrections, or other events which might destroy the results of the experiment.<sup>11</sup>

As Lord Bryce observed, the phenomena with which the chemist deals are and always have been identical; they can be weighed and measured, whereas human phenomena can only be described. We can measure temperature, humidity, and the force of wind, but we cannot determine how hot were the passions of a mob. We may say that in a political crisis the opinion of a cabinet will have weight, but we cannot say how much it will be. Opinions, emotions and other factors which influence politics are not capable of computation.<sup>12</sup>

But while scientific experimentation, as the term is employed in

<sup>9</sup> "Methods of Observation and Reasoning in Politics," vol. I, pp. 164-165.

<sup>10</sup> "Experiments," says Lord Bryce, "can be tried in physics over and over again till a conclusive result is reached, but that which we call an experiment in politics can never be repeated because the conditions can never be exactly reproduced, as Heraclitus says that one cannot step twice into the same river. Prediction in physics may be certain; in politics it can at best be no more than probable."

"Modern Democracies," vol. I, p. 14. Compare also Vaughan, *op. cit.*, vol. II, p. 201, who says that political experimentation in the sense in which it is applied in the study of physics or chemistry is impossible since the power of isolating each individual process of inquiry, which is the essence of such experimentation, does not exist. Having ruled out the experimental method, Vaughan concludes that there remain only two true methods of science available in political philosophy, namely, those of observation and comparison.

<sup>11</sup> Compare Bain, "Deductive and Inductive Logic," p. 563.

<sup>12</sup> "Modern Democracies," vol. I, p. 14; also *Amer. Pol. Sci. Rev.*, vol. III, p. 2.

the physical sciences, is inapplicable to the study of politics, practical experiments, the *experimenta fructifera* of Bacon, are being constantly made, consciously or unconsciously. In fact, as Comte pointed out, political experimentation really takes place whenever the regular course of state life undergoes conscious or unconscious changes.<sup>13</sup> Governments, of necessity, are constantly trying experiments on the community.<sup>14</sup> Indeed, the whole life of the state is a succession of activities which, in a sense, are experimental in character. The enactment of every new law, the establishment of every new institution, the inauguration of every new policy, is experimental in the sense that it is regarded merely as provisional or tentative until the results have proved its fitness to become permanent. Lord Bryce in his "American Commonwealth" pointed out that one of the merits of the American federal system is that it enables the people to try experiments in legislation which could not be tried in a large centralized state.<sup>15</sup> By observing the operation of a new law or a new policy and then enlarging or diminishing its scope as experience suggests modification, the legislature is able to adapt its provisions to the needs and desires of the community. The process is in the nature of an experiment whose purpose is not the ascertainment of a general truth—like *experimenta lucifera*—but the testing and improving of the institution.

**Sociological, Biological, and Psychological Methods.**—The so-called sociological method considers the state primarily as a social organism, whose component parts are individuals, and seeks to deduce its qualities and attributes from the qualities and attributes of the men composing it. It seeks to interpret the life of the state by applying to it the theory of evolution in the same way that the development of the individual is explained by evolution. Closely akin to the sociological method is the biological, which attributes to the state the qualities of a living organism and which attempts to define and classify its separate parts, to describe its structure in the nomenclature of anatomy, and to differentiate and analyze its functions and trace its life processes

<sup>13</sup> "Positive Philosophy," vol. II, p. 83.

<sup>14</sup> Lewis, *op. cit.*, vol. I, p. 173. "If by an experimental science," said Lewis, "we mean a science which admits of scientific experiments, of *experimenta lucifera*, then politics is not an experimental science; but if we mean a science founded on observation and experience, politics is an experimental science." *Op. cit.*, p. 178.

<sup>15</sup> Vol. I (1910), p. 353.

according to the methods and in the terminology of the biological sciences. Among those who have made notable contributions to the study of organized society from the sociological and biological points of view may be mentioned Auguste Comte, Herbert Spencer, the Austrian scholars Gumplovicz and Schäffle, the French writers Durkheim, De Greef, Fouillée, Worms, and Letourneau, and the Russians Lilienfeld and Novicow. Comte in his study of society dwelt at length upon what he called "social physics" and "social physiology."<sup>16</sup> Spencer, who was deeply infatuated with the biological analogy, drew a striking parallel between the social and animal organisms, pointing out that each possessed a "sustaining system," a "distributing system," and a "regulating and expending system."<sup>17</sup>

The first criticism to be made of the sociological and biological methods is that they are not so much modes of investigation as points of view from which the state may be considered. The biological method rests mainly upon analogy instead of upon real similarity in essentials, and attempts to apply biological laws to the development of state life as if the state were in essence no different from an animal. It requires but little reflection to see that the resemblance between the body politic and the human organism is at best only superficial, that the laws of growth and change which govern the one are inapplicable to the growth and development of the other, and that little or nothing is to be gained by dwelling upon the analogy.<sup>18</sup> The attempt to construct a science of society by means of biological analogies, says Giddings, has been abandoned by all serious investigators of social phenomena.<sup>19</sup>

<sup>16</sup> "Positive Philosophy," ed. of 1868, pp. 487-489. See Worms, *Revue int. de sociologie*, 1893, p. 12; Gumplovicz, "Sociologie und Politik," also his "Sociologische Staatsidee"; Durkheim, "Les règles de la méthode sociologique"; De Greef, "Les lois sociologiques"; and Fouillée, "La science sociale contemporaine," ch. 3. See also the summary in Barnes, "Sociology and Political Theory," pp. 28-29.

<sup>17</sup> "Principles of Sociology" vol. I, chs. 7, 8 and 9.

<sup>18</sup> See an article by Lilienfeld, entitled "Y a-t-il une loi de l'évolution des formes politiques?" in the *Annales de l'inst. de sociologie*, 1895, pp. 235-246. For a negative view see an article by Starke in the same journal in the year 1896. Professor Vaughan, while admitting that biology might throw some light on political and moral inquiry since "there is a close connection between the moral and physical nature of man" and since "the moral capacities of man are largely determined by his physical organism, which in turn is largely determined by climate, soil, and other physical influences," thought its practical value had been greatly exaggerated. "History of Political Philosophy," vol. II, p. 200.

<sup>19</sup> "Democracy and Imperialism" (1900), p. 29.

To a less degree, perhaps the same thing may be said of the so-called psychological method, which in recent years has been employed by many writers who have attempted to explain social phenomena and interpret social institutions through psychological laws.<sup>20</sup>

**The Juridical Method.**—A method of study which is in great favor among German political writers and to a less degree among the French is the juristic or juridical method.<sup>21</sup> It is the method or point of view of the analytical jurists. It is the aim of this method, according to Jellinek, to "determine the content of the rules of public law and to deduce therefrom the conclusions to which they lead." It regards the state primarily as a corporation or juridical person and views political science as a science of legal norms (*Staatsrechtslehre*) having nothing in common with the science of the state as a social organism (*soziale Staatslehre*). It treats the state primarily as an organization for the creation and enforcement of law. It conceives the relations of the state always as "*öffentliche Verhältnisse*," and political concepts as "*Rechtsbegriffe*," and describes the constitution and activities of the state only in terms of their "*rechtliche Natur*." In short, it treats organized society, not as a social or political phenomenon, but as a purely juridical régime, an *ensemble* of public law rights and obligations, founded on a system of pure logic and reason.<sup>22</sup> The state as an organism of growth and development, however, cannot be understood without a consideration of those extralegal and social forces which lie back of the constitution and which are responsible for many of its actions and reciprocal reactions. Any view, therefore, which conceives the state merely as a public corporation is as narrow and fruitless as

<sup>20</sup> For a defense of the psychological method in the study of the social sciences see an article by M. Beudant, in the *Revue du droit public*, 1896, vol. V, pp. 434-456. Beudant's views are criticized by M. Worms (*ibid.*, vol. VI, pp. 66-70) and the latter's reply is in turn answered by Beudant (*ibid.*, pp. 469-475). See also Le Bon, "Lois psychologiques de l'évolution des peuples"; Baldwin, "Psychology of Social Organization" in the *Psychological Review*, vol. XIV, p. 482; Ward, "Psychic Factors of Civilization," p. 299; Tarde, "Lois de l'imitation," especially ch. 2.

<sup>21</sup> See Jellinek, "Recht des modernen Staates," bk. I, ch. 2, tit. 6 (Die juristische Methode in der Staatslehre). The juridical theory was first propounded by Gerber in his "Grundlagen des deutschen Staatsrecht," published in 1865.

<sup>22</sup> Jellinek, *op. cit.*, p. 49; also his "System der subjektiven Rechte," pp. 21 ff.

the Hegelian doctrine which goes to the opposite extreme and considers it merely as a moral entity.<sup>23</sup>

**The Comparative Method.**—The comparative method, first employed by Aristotle, later by Montesquieu, and still more recently by De Tocqueville, Laboulaye, Bryce, and others, aims through the study of existing polities or those which have existed in the past to assemble a definite body of material from which the investigator by selection, comparison, and elimination may discover the ideal types and progressive forces of political history. Only those states which are contemporaneous in point of time, as Jellinek remarks, and which have a common historical basis (*Boden*) and common historical, political, and social institutions may be compared with advantage. The comparative method, observes M. Salcielles, a noted French publicist, discovers the "general current" which runs through the whole body of constitutions and upon which experience has set the stamp of approval. "*Ce courant général*," he declares, "*on le découvre par l'étude critique de chacune des législations étrangères envisagées au point de vue économique et social, la recherche des points de contact susceptibles de correspondre à un courant d'évolution commun à plusieurs pays, la détermination d'un ou de plusieurs types juridiques vers lesquels doive s'orienter la politique juridique des différents pays à état social sensiblement similaire.*"<sup>23a</sup> The danger of the comparative

<sup>23</sup> For expositions of the juridical method see Deslandres, *op. cit.*, pp. 108, 115. For a defense of it see Combothecra, "La conception juridique de l'état"; Sari-polos, "La démocratie et l'élection proportionnelle"; Michoud, "Théorie de la personnalité morale"; Willoughby, "Fundamental Concepts," ch. 2; Duguit, "Droit constitutionnel" (1911), vol. I, pp. 43 ff.; and Shepard and Sabine, Introduction to Krabbe, "Modern Idea of the State" (1922), pp. xxx ff. An excellent example of the use of the juridical method is found in Laband's brilliant study of the former German Empire, "Staatsrecht des deutschen Reiches." This method, as Laband states it in the preface to his treatise, is that of "analysis of public law relations, the establishment of the juristic nature of the state, the discovery of general superior juridical principles and the deduction therefrom of conclusions."

<sup>23a</sup> "Conception et objet de la science du droit comparé," in *Le bulletin de la société de la législation comparée* for 1900. Lord Bryce, speaking of the comparative method, which he himself applied in his own studies, said: "That which entitles it to be called scientific is that it reaches general conclusions by tracing similar results to similar causes, eliminating those disturbing influences which, present in one country and absent in another, make the results in the examined cases different in some points while similar in others. When by this method of comparison the differences between the working of democratic government in one country and another have been noted, the local or special conditions,

method lies in the liability to error to which it is susceptible in practice, since, in the effort to discover general principles, the diversity of conditions and circumstances, such as differences of temperament and genius of the people, economic and social conditions, moral and legal standards, political training and experience, are apt to be ignored or minimized.

J. S. Mill undertook to show that the comparative method may assume several forms, the "most perfect" of which is the process of *difference* by which two polities identical in every particular except one are compared with a view to discovering the effect of the differing factor. Thus two states are compared which are similar as regards their natural wealth, legal systems, racial conditions, etc., but one of which maintains a restrictive trade system. If, therefore, one is found to be prosperous and the other not, a general conclusion is drawn with regard to the effect of restrictive commercial policies upon the national prosperity. The method of *indirect difference* compares two classes of "instances" which agree in nothing but the presence of a factor *on* the one side and its absence on the other. Thus one state which maintains a protective system may be compared with two or more states which have nothing in common but a free-trade policy. By the method of *agreement* two polities wholly different with the exception of two common factors may be compared. Thus two states agreeing in no particular except in having a restrictive trade system and in being prosperous are compared with a view to establishing a connection between the restrictive policy and the prosperity. Like the method of difference, it is inadequate because its results are likely to be affected by extraneous circumstances, or by a "plurality of causes with an inter-mixture of effects."<sup>24</sup>

physical or racial or economic, will be examined so as to determine whether it is in them that the source of these differences is to be found. If not in them, then we must turn to the institutions, and try to discover which of those that exist in popular governments have worked best . . . When allowance has been made for the different conditions under which each acts, it will be possible to pronounce, upon the balance of considerations, which form offers the best prospect of success. After the differences between one popular government and another have been accounted for, the points of similarity which remain will be what one may call democratic human nature, viz., the normal or permanent habits and tendencies of citizens in a democracy and of a democratic community as a whole." *Op. cit.*, vol. I, p. 18.

<sup>24</sup> Bain, "Deductive and Inductive Logic," p. 565.

**The Historical Method.**—What is really a particular form of the comparative method is the historical method, for the facts relating to past polities have little value for political science until they have been subjected to the several processes of treatment which, as stated above, may be comprehended under the general term "comparison." It is almost a commonplace to-day to affirm the necessity of historical study as a basis for the scientific investigation of political institutions which have historical backgrounds. They can be fully comprehended only through a knowledge of their past: how they have developed, how they have become what they are, and to what extent they have responded to the purposes for which they were originally destined.<sup>25</sup> The maxim that constitutions grow instead of being made would have no meaning apart from this truth. The historical method, says Sir Frederick Pollock, "seeks an explanation of what institutions are and are tending to be, more in the knowledge of what they have been and how they came to be what they are, than in the analysis of them as they stand."<sup>26</sup> It is, he said, nothing more than the doctrine of evolution applied to human institutions. It brings in review the great political movements of the past, traces the organic development of the national life, inquires into the growth of political ideas from their inception to their realization in objective institutions, discovers the moral idea as revealed in history, and thereby points out the way of progress.<sup>27</sup>

But the historical method, like the others, has its limitations. Lord Bryce warned us against superficial resemblances. So-called historical parallels, as he pointed out, are usually interesting and sometimes illuminating, but they are often misleading. There is, he said, always the danger of confusing the personal or accidental factors with the general causes at work, such as attributing to some outstanding personality an influence upon the course of history out of proportion to its importance.<sup>28</sup> He pointed out that the historical investigator is exposed to emotional influences such as do not affect the inquirer in a

<sup>25</sup> For a discussion of the nature and value of the historical method, see Jellinek, *op. cit.*, ch. 2, tit. 5. Among the outstanding scholars who have adopted the historical method may be mentioned Montesquieu in France, Savigny in Germany, and Sir Henry Maine in England. As to their work, see Barker, "Political Thought from Spencer to the Present Day," ch. 6.

<sup>26</sup> "History of the Science of Politics," p. 11.

<sup>27</sup> Compare Bluntschli, "Allgemeine Staatslehre," bk. I, ch. 2.

<sup>28</sup> *Amer. Pol. Sci. Rev.*, vol. III, p. 8.

chemical laboratory. The latter has neither love nor hate for a hydro-carbon, but the historical investigator may be influenced, consciously or unconsciously, by his religious beliefs, his political partisanship, his racial prejudices, or his philosophical doctrines."<sup>29</sup>

What Professor Seeley called the "irresistible temptation to mix up what ought to be with what is" finds an illustration in the ideas of Sidgwick and Pollock (which were also the ideas of Plato and Aristotle), according to which the main object of political science is the discovery of the perfect or ideal state. To accomplish this object, political science must first proceed to inquire what is the end of the state, and having satisfactorily answered this question, it must ascertain what institutions and laws are best adapted for the attainment of this end. Seeley criticized this method as unnatural and fruitless. Instead of beginning with an inquiry into the purpose of the state and the characteristics of the best state, he would proceed, first, with classifying the states which he wished to study; second, with analyzing the structure of a particular state and distinguishing the functions of its several organs; third, with tracing its growth and development, noting any abnormal conditions in its life history; and, fourth, with philosophizing upon the nature of the state in general. The vast mass of facts collected by different observers must be subjected to rigid scientific tests. "We must," he said, "think, reason, generalize, define, and distinguish; we must also collect, authenticate, and investigate. If we neglect the first process, we shall accumulate facts to little purpose, because we shall have no test by which to distinguish facts which are important from those which are unimportant; and, of course, if we neglect the second process, our reasonings will be baseless and we shall but weave scholastic cobwebs."<sup>30</sup>

<sup>29</sup> "Modern Democracies," vol. I, p. 15. A less favorable opinion of the historical method was held by Sidgwick, who maintained that the primary aim of political science is to determine what *ought to be* so far as the constitution and action of government are concerned and that this end cannot be discovered by a historical study of the forms and functions of government. "I do not think," he said, "that the historical method is the one to be primarily used in attempting to find reasoned solutions of the problems of practical politics." Sidgwick, however, conceded that the historical method has a place in the science of the state. "By means of it," he said, "we can ascertain the laws of political evolution and thus forecast, though dimly, the future. "Development of European Polity," p. 5; also "Elements of Politics," pp. 7-14.

<sup>30</sup> "Introduction to Political Science," p. 19.

**The Method of Observation.**—Lord Bryce laid great emphasis upon what he called the method of observation, that is, the study of governments and political institutions by observing at close range their actual working—a method which he himself followed. He visited the countries whose governments he desired to study and gained much of his information by personal conversation with public men and by direct observation of what governments were doing and how they were doing it. The political investigator, he said, must not confine his observations to a single country ; the field must be enlarged to include the phenomena of all countries ; the fundamentals of human nature are the same everywhere, but political habits and temperaments vary in different countries. To the political investigator he offered sound advice and uttered words of warning. He must beware of superficial resemblances and deadly analogies ; he must avoid generalizations not based on facts ; he must be critical of his sources of information, and he must disengage personal or accidental causes from general causes. The first desideratum, he said, is to get the fact, and he added : "Make sure of it. Get it perfectly clear. Polish it till it sparkles and shines like a gem. Then connect it with other facts. Examine it in its relation to them, for in that lies its worth and its significance. It is of little use alone. So make it a diamond in the necklace, a stone, perhaps a corner stone, in your building."<sup>31</sup>

<sup>31</sup> Presidential address, *Amer. Pol. Sci. Rev.*, vol. III, p. 10. Compare also his "Modern Democracies," vol. I, p. 17.

President Lowell declares that "politics is an observational and not an experimental science" and that the method of observation is the true method of investigation. A library, he says, is a laboratory of political science only in a limited sense, books for most purposes being no more original sources for the "physiology of politics than they are for geology or astronomy." "The main laboratory for the actual working of political institutions," he adds, "is not a library but the outside world of political life" and there the phenomena must be sought and observed at first hand. "The Physiology of Politics," *Amer. Pol. Sci. Rev.*, vol. IV, p. 8.

## CHAPTER III

### RELATIONS OF POLITICAL SCIENCE TO OTHER SCIENCES

#### Selected References

- BARKER, "Political Thought in England from Spencer to the Present Day" (1915), chs. 5-6.
- BARNES, "Sociology and Political Theory" (1924), ch. 2.
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- BRYCE, "Relations of Political Science to History and Practice," *Amer. Pol. Sci. Rev.*, vol. III, pp. 1 ff. Also his article, "Relation of Geography to History," *Contemporary Review*, vol. LVII.
- BURGESS, "Relation of Political Science to History," in *Report of the American Historical Association* (1896), vol. I, pp. 207-211.
- CATLIN, "The Science and Method of Politics" (1927), pt. II, ch. 2.
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- KALLEN, "Political Science as Psychology," *Amer. Pol. Sci. Rev.*, vol. XVII, pp. 181 ff.
- MERRIAM, "New Aspects of Politics" (1925), chs. 3-4.
- MERRIAM, BARNES, and others, "History of Political Theories. Recent Times" (1924), chs. 9-12 (Various authors).
- SEELEY, "Introduction to Political Science" (1896), Lecture I.
- Seligman, "Principles of Economics" (1907), pp. 28-34.

**The Auxiliaries of Political Science.**—Political science is not the only science which deals with men in organized society, for, as we have seen, the state manifests itself under the form of a social as well as a political organism and indeed is not without a psychical and a physical element. Although an autonomous science in the sense that it is not a mere discipline of some other science, it does not stand entirely unrelated to other sciences any more than the state stands isolated in the universe of phenomena. We can no more understand political science, as the science of the totality of state phenomena, without a knowledge of the allied sciences or disciplines, than we can

comprehend biology without chemistry, or mechanics without mathematics.<sup>1</sup> It was well said by Paul Janet, an eminent French writer, that political science is "closely connected with political economy or the science of wealth; with law, either natural or positive, which occupies itself principally with the relations of citizens one to another; with history, which furnishes the facts of which it has need; with philosophy, and especially with morals, which gives to it a part of its principles."<sup>2</sup> Other writers, like Jellinek, have treated geography, physical anthropology, ethnology, psychology and ethics as among the studies auxiliary to political science.<sup>3</sup> Formerly there was a disposition to exaggerate and emphasize to their common detriment the independence of each branch of knowledge, but the tendency of modern thought is to accentuate the relations instead of the differences. In this connection Sidgwick has aptly remarked that it is for the good of any department of knowledge or inquiry to understand as thoroughly as possible its relation to other sciences and to see clearly what elements of its reasonings it has to take from them and what in its turn it may claim to give them.<sup>4</sup> Political science must therefore regard the allied social sciences as "working partners" in the achievement of what is, in large measure, a common task.

**Relation to Sociology.**—First of all, political science touches at many points sociology, which may be described as the fundamental social science. The state is a sociological as well as a political phenomenon and during its early stages it is in fact, as Ratzenhofer pointed out, really more of a social than a political institution. As has been well said, the political is embedded in the social, and if political science remains distinct from sociology, it will be because the breadth of the field calls for the specialist, and not because there are any well-defined boundaries marking it off from sociology.<sup>5</sup> While, however, the two

<sup>1</sup> As to this, compare the views of Jellinek, "Recht des modernen Staates," bk. I, ch. 4, tit. I; also Von Mohl, "Geschichte und Litteratur der Staatswissenschaften," vol. I, p. 1; and Zacharia, "Vierzig Bücher vom Staate," vol. I, bks. VII-VIII, where the relations of political science to mechanics, statistics, and chemistry are discussed at length.

<sup>2</sup> Art. "Politique," in Block's "Dictionnaire de la Politique," vol. II, p. 576.

<sup>3</sup> *Op. cit.*, pp. 72-120.

<sup>4</sup> "Relation of Ethics to Sociology," *Int. Jour. of Ethics*, vol. X, p. 8.

<sup>5</sup> Ross, "Foundations of Sociology," p. 22. For an illuminating discussion of the relations of sociology to other sciences, particularly to politics and economics,

sciences touch at many points, so that there are no natural boundaries between them, their spheres have been pretty definitely differentiated for purposes of scientific investigation. It is well, therefore, to recognize that the domains and the problems of the two sciences are by no means the same.

In general, we may say that sociology is concerned with the scientific study of society viewed as an aggregate of individuals (the social aggregate) or, as has been said, it is the "science of men in their associated processes";<sup>6</sup> while political science deals with a particular portion of society viewed as an organized unit. Political science is concerned with men only when they have become organized as a state; for society which has not yet received the impress of political organization, political science is a datum. It has, therefore, a narrower and more restricted field, and begins much later with the life of mankind than does sociology. The study of the life and institutions of men prior to the establishment of the state, political science is content to leave to history and sociology. Political science is concerned with only one form of human association, the state; sociology deals with all forms of association. Political science assumes to start with that man is a political being; it does not attempt to explain, as sociology does, how and why he became a political animal.<sup>7</sup>

In sociology the unit of investigation is the *socius*, that is, the individual viewed not merely as an animal and a conscious being, but also as a neighbor, a citizen, a co-worker, in short, a social creature.<sup>8</sup> In political science the unit of study is the state as distinct from the

sec Small, *American Journal of Sociology*, July, 1906, pp. 11-31. Giddings remarks that "the greatest step forward that political science has made in recent years has been the discovery that its province is not coextensive with the investigations of society, but that the lines of demarcation can be drawn." "Principles of Sociology," p. 35.

<sup>6</sup> Small, "General Sociology," p. 7.

<sup>7</sup> Compare Barker, "Political Thought from Spencer to the Present Day," p. 159.

<sup>8</sup> Compare Giddings, "Elements of Sociology," p. 11; Small, *American Journal of Sociology*, January, 1900; Ward, *Popular Science Monthly*, June, 1902. Gumplowicz, an Austrian economist and sociologist, maintained that the group instead of the individual is the unit of sociological investigation. He worked out an interesting sociological theory of the state which considers social groups instead of "free and equal" individuals as the constituent elements of the state. See his "Die sociologische Staatsidee," p. 52; also his "Sociologie und Politik," pp. 53-58.

nation, the tribe, the clan, or the family, though not unconnected with them ; that is, its primary subject is a definite portion of society which manifests, in a comparatively high degree, a political self-consciousness and which has become organized politically. While their respective fields are largely separate and distinct, political science and sociology are mutually contributory, the one to the other. Sociology derives from political science knowledge of the facts regarding the organization and activities of the state, while political science derives in large measure from sociology its knowledge of the origin of political authority and the laws of social control.<sup>19</sup> The political scientist therefore ought to be at the same time a sociologist, and vice versa.<sup>20</sup>

**Relation to History.**—In the second place, political science is closely related to history. It is, as Jellinek remarked, almost a commonplace to-day to affirm the necessity of historical study as a basis for a proper understanding of institutions, whether they be political, legal, or social.<sup>21</sup> The political scientist should study not only the nature of political institutions, but how they have developed and to what extent they have fulfilled the purposes of their existence. History furnishes us in a great measure the materials for comparison and induction. This is especially true of political history, which concerns itself with the formation of states, their growth, and their decline. While history furnishes much of the data for political science, it is not true, as Freeman once declared, that history is past politics or that politics is present history. Not all of history is "past politics." Much of it—like the history of art, of science, of inventions, discoveries, military campaigns, language, customs, dress, industries, religious controversies—has little, if any, relation to politics and affords no material for political investigation. On the other hand, not all political

<sup>19</sup> Compare Barnes, "Sociology and Political Theory," p. 24, and Elwood, "Sociology in Its Psychological Aspects," pp. 36-37. Barnes asserts that "the most significant thing about sociology and modern political theory is that most of the changes which have taken place in political theory in the last thirty years have been along the line of development suggested and marked out by sociology." "Some Contributions of Sociology to Modern Political Theory," in Merriam, Barnes, and others, "History of Political Theories, Recent Times" (1924), p. 399.

<sup>20</sup> As to this, Professor Giddings remarks that "to teach the theory of the state to men who have not learned the first principles of sociology, is like teaching astronomy or thermodynamics to men who have not learned the Newtonian laws of motion." "Principles of Sociology," p. 37.

<sup>21</sup> "Recht des modernen Staates," p. 41.

science is history. Much of it is of a purely philosophical and speculative character, and cannot therefore be assigned to the category of history. To fully comprehend political science in its fundamental relations, we must study it historically, and to interpret history in its true significance we must study that politically. As studies they are therefore mutually contributory and supplementary. "Politics are vulgar," said Professor Seeley, "when not liberalized by history, and history fades into mere literature when it loses sight of its relation to politics." "History without political science," he said, "has no fruit; and political science without history has no root."<sup>12</sup> Separate them, says Burgess, and the one becomes a cripple, if not a corpse, the other a will-of-the-wisp.<sup>13</sup> Seeley conceived history to be the name of the residuum which is left when one group of facts after another has been taken possession of by some science. Ultimately, he said, a science will take possession of the residuum, and this science will be political science. Many of the facts of history, he pointed out, are no longer recorded in historical treatises, but have been appropriated by other sciences. Thus the facts of the past relating to meteorology, biology, hygiene, surgery, and various other sciences and arts are recorded not in historical, but in scientific treatises. Physiology has taken possession of a definite group of historical facts; pathology, of another; political economy is appropriating the facts of industry; jurisprudence, of law; etc. If this process of appropriation continues, all the facts of history in the end will be swallowed up.<sup>14</sup> Already historians deal meagerly with the facts regarding the phenomena of the sciences and arts, contenting themselves with referring the reader to some special treatise for information.

**Relation to Economics.**—With *political economy*,—or *economics*, to use the more modern term,—political science is closely related; indeed, economics was classed as a branch of political science by some early economists.<sup>15</sup> It was first called "political" economy by the Greeks, and was defined by them as the art of providing revenue for

<sup>12</sup> "Introduction to Political Science," p. 4.

<sup>13</sup> "Relation of History to Political Science," *Annual Report American Historical Association* (1896), vol. I, p. 211.

<sup>14</sup> *Op. cit.*, p. 12.

<sup>15</sup> For example, Dugald Stewart, "Lectures on Political Economy," vol. I, p. 24.

the state.<sup>16</sup> Senior remarked that as late as the eighteenth century political economy was regarded as a "branch of statesmanship," particularly by the physiocrats, and that those who assumed the name of political economists avowedly treated, not of wealth, but of government.<sup>17</sup> His own conception of the scope of political economy was affected by this view, and he laid it down as a principle that this science involves a "consideration of the whole theory of morals, of government, and of civil and criminal legislation."

Without quoting further from the earlier writers, it may be stated that most of them conceived economics to be a branch of the general science of the state. Writers of the present day no longer hold to the earlier conception, yet there is no difference of opinion among them concerning the existence of a close relationship of economics and politics as ancillary social sciences. Political and social life is obviously intermixed with, and the activities and even the forms of government are profoundly influenced by, economic conditions. Conversely, there is a distinct interaction of politics upon economics. The production and distribution of wealth are to some extent determined by the existing forms of government.<sup>18</sup> The solution of many economic problems must come through political action, while, on the other hand, some of the fundamental problems of government have their origin in economic conditions. Thus tariff laws and trade restrictive acts, generally, are favored or opposed largely on economic grounds and to a great extent the whole question of the relation between government and liberty is at bottom an economic problem. Some of the important questions of present-day politics—government control of public utilities, the relation of the state to corporate enterprise, and its attitude toward the whole question of capital and labor—are at the same time fundamentally questions of economics; indeed, the whole theory of government administration is largely economic.<sup>19</sup> The underlying principles of state socialism are quite as much economic in character as political,

<sup>16</sup> Seligman, "Principles of Economics," p. 7.

<sup>17</sup> "Political Economy," p. 1.

<sup>18</sup> Compare Seligman, "Principles of Economics," p. 30; and Hadley, "Relation of Politics and Economics," *Publs. of Amer. Econ. Assoc.* (1889).

<sup>19</sup> It is no doubt true, said Nicholson, that the system of government "operates on economic facts," and that "economic history furnishes endless examples of the injurious effects of bad government." "Principles of Political Economy," p. 13.

and in so far as it is put into practice the problems which it involves are largely economic.<sup>20</sup>

**Relation to Statistics.**—The use of statistics has come to be one of the important instruments and sources of political investigation. Both Von Mohl and Holtzendorff in their day classed statistics as one of the "political sciences," and it is mentioned in the Century Dictionary as one of the "branches" of political science. Von Mohl described statistics as a means through which a picture of existing political and social conditions could be obtained,<sup>21</sup> while Holtzendorff pointed out that, in addition, they furnished a means by which an insight into the relations of political phenomena might be gained.<sup>22</sup> Statistics, it has been said, contribute to the study of political and social institutions somewhat as microscopy contributes to pathology.<sup>23</sup> They furnish quantitative measurements of social phenomena and of the results of governmental activities, expressed in figures, and thus provide material for inductive studies—material without which the political investigator would often be helpless. Furthermore, as has been said, they are a means through which our attention is called to possible relations of cause and effect and thus reveal the existence of a reign of law in the physical world.<sup>24</sup>

<sup>20</sup> Compare Munroe Smith, "The Scope of Political Science, *Pol. Sci. Quar.*, vol. I, p. 4.

As to the part which economic factors have played in political theory, see Barnes, "Sociology and Political Theory" pp. 67-70. This author calls attention to the fact that many of the great political writers, Plato, Aristotle, Hobbes, Harrington, Locke, Montesquieu, and others in their treatises discussed certain relations between economics and political science.

<sup>21</sup> "Encyklopädie der Staatswissenschaften," p. 745.

<sup>22</sup> "Principien der Politik," p. 18. Compare also Amos ("Science of Politics," p. 19), who asserted that the "study of statistics must be regarded as a most valuable ally and an unmistakable proof of the scientific character of political studies."

<sup>23</sup> Gumplovicz, "Sociologie und Politik," p. 40.

<sup>24</sup> Mayo-Smith, "Statistics and Sociology," pp. 13, 15. Compare also Merriam, "Politics and Numbers" in his "New Aspects of Politics," ch. 4. The Belgian statistician Quetelet (1796-1874) was the first investigator to make extensive use of statistics in the study of social phenomena. See his work, "Sur l'homme et le développement de ses facultés" (1835). President Lowell, in his "Government of England" and his "Public Opinion and Popular Government," has shown how effective the use of statistics can be made in the analysis of voting in legislative bodies and of voting on measures submitted to popular vote. Compare also Fairlie, "Politics and Science," *Sci. Monthly*, vol. XVIII, p. 28. President Lowell has taken occasion, however, to point out the necessity of carefulness in the use of

The manifestations of political and social, like those of economic life, readily lend themselves to the statistical method ; and when the results are properly measured, and carefully arranged and tabulated according to scientific methods and criteria, they serve as a guide for administrative action, as a basis for legislation, and as a means of testing the expediency or effectiveness of political policies. It is the practice of all modern governments to collect and preserve in systematic form statistics relating to political, social, and economic conditions. No government could legislate intelligently without the aid of statistical information concerning its trade, finance, military and economic resources, social condition of the people, etc. Such evils as arise from the prevalence of disease, vice, crime, illiteracy, vicious moral training, and unsanitary surroundings, must first be proceeded against statistically. Moreover, statistics relative to births, marriages, deaths, and divorces, can often be made to serve an important purpose in the formulation of new policies of political and social reform.

**Relation to Psychology.**—In recent years the *rapprochement* between political science and psychology has become very marked, as shown by the increasing frequency with which writers have attempted to explain certain classes of social phenomena and much of political life by recourse to the laws of psychology. "The application of the psychological clue to the riddles of human activity has indeed become the fashion of the day. If our fathers thought biologically, we think psychologically."<sup>25</sup> Comte in his day gave great weight to psychology as the basis of his theories and Spencer relied upon it almost as much as he did upon biology. Holtzendorff enumerated *Völkerpsychologie* as one of the disciplines of political science,<sup>26</sup> and Bagehot in his "Physics and Politics" (1873), attempted to explain the working of

statistics. "Statistics, like veal pies," he says, "are good if you know the person that made them, and are sure of the ingredients." And he adds : "by themselves they are strangely likely to mislead, because unless the subject is understood in all its bearings, some element can easily be left out of account which wholly falsifies the result." "The Physiology of Politics," *Amer. Pol. Sci. Review*, vol. IV, p. 10.

<sup>25</sup> Barker, "Political Thought from Spencer to the Present Day," p. 148. Compare also Baldwin's observation that the biological theory which formerly held so conspicuous a place in the methodology of political science is being displaced by the psychological. "Psychology of Social Organization," *Psychological Review*, vol. IV, p. 482. Giddings expresses the same opinion; "Democracy and Imperialism" (1900), p. 29.      <sup>26</sup> "Principien der Politik," p. 19.

the English constitution in large measure upon psychological grounds. A French publicist, M. Boutmy, in two volumes dealing with the political psychology of the English and American people, pointed out the influence of psychological factors upon the character and working of English and American political institutions.<sup>27</sup> Barker remarks that since the publication of Bagehot's "Physics and Politics," "political theorists have turned social psychologists."<sup>28</sup> This statement may or may not be accurate, but it is true that there has been a large output of literature in which it has been attempted to explain and interpret political and social phenomena through the laws of psychology.

Among those who have made the most notable of such attempts may be mentioned Tarde,<sup>29</sup> Durkheim,<sup>30</sup> and LeBon<sup>31</sup> in France; McDougall,<sup>32</sup> Trotter,<sup>33</sup> and Wallas<sup>34</sup> in England; and Baldwin,<sup>35</sup> Ellwood,<sup>36</sup> and others in America.

<sup>27</sup> "Essai d'une psychologie politique du peuple Anglais" (1901) and "Éléments d'une psychologie politique du peuple Américain" (1902). Bryce and Ratzel likewise dwelt upon the political psychology of the American people. Bryce, "American Commonwealth," vol. II, pp. 284, 292, and Ratzel, "Politische Geographie der Vereinigten Staaten," p. 625.

<sup>28</sup> *Op. cit.*, p. 149.

<sup>29</sup> "Les lois de l'imitation" (1903), "L'opinion et la foule" (1901), and other works.

<sup>30</sup> Barnes, "Durkheim's Political Theory," *Pol. Sci. Quar.* (1920), vol. XXXV, pp. 236 ff.

<sup>31</sup> "Lois psychologiques de l'évolution des peuples" (1899) and other works.

<sup>32</sup> "The Group Mind" (1920) and "Social Psychology" (1914).

<sup>33</sup> "Instincts of the Herd in Peace and War" (1919).

<sup>34</sup> "The Great Society" (1904); "Human Nature in Politics" (1908); and "Our Social Heritage" (1921). Barker (*op. cit.*, p. 230) describes "The Great Society" as a treatise on "social psycho-therapeutics." Wallas endeavors, in the light of social psychology, to diagnose the diseases of present-day representative government and to suggest the appropriate remedies.

<sup>35</sup> "The Individual and Society; or Psychology and Sociology" (1921), and other works.

<sup>36</sup> "Sociology in Its Psychological Aspects" (1912) and "The Psychology of Human Society" (1925). Among other books which emphasize psychological factors may be mentioned Lippman, "Public Opinion" (1922); Follett, "The New State" (1918); Bentley, "The Process of Government" (1908); and MacIver, "Community" (1917). The literature of the subject is very large. The relation of psychology to political science and the contributions of the former to the latter are discussed in detail by Gehlke in a chapter entitled "Social Psychology and Political Theory" in Merriam, Barnes, and others, "Political Theories, Recent Times," ch. 10; and by Barnes, "Sociology and Political Theory," especially pp. 73 ff., where the abundance of literature is cited.

"The social psychologist," it has been said, "approaches the facts of group life on the assumption that these facts are facts of group consciousness, which it is his problem to describe and explain by means of the method which a natural science uses in order to describe and explain the facts of matter." Accordingly, just as the psychologist regards himself as studying by means of the methods of natural science, a subject matter consisting in "states of consciousness as such," so the social psychologist regards himself as studying, by means of the same method, a subject matter consisting in states of group consciousness as such.<sup>37</sup> Lord Bryce went so far as to say that "politics has its roots in psychology, the study (in their actuality) of the mental habits and volitional proclivities of mankind."<sup>38</sup>

If we consider the state apart from its concrete organization and its manifestations through its legally constituted agencies, we shall see that it is essentially psychical rather than physical, subjective rather than objective in character.<sup>39</sup> Consequently, the course of state life is determined in large measure by psychic factors. Government to be stable and really popular must reflect and express the mental ideas and moral sentiments of those who are subject to its authority; in short, it must be in harmony with what LeBon calls the "mental constitution of the race."<sup>40</sup> Psychology, therefore, contains the key to the problem of the adaptation of particular forms of governments and laws to the character of the people. History in its great outlines, says LeBon, may be considered as the simple unfolding of the psychological conceptions of the race, and this is especially true of political history. It would be easy to show that the basis of the present-day agitation for many political reforms is to be found in mental attitudes rather than in any real need for reform. The history of the past furnishes not a few examples of *coups d'état*, *bouleversements*, and revolutions that are explainable

See also Kallen, "Political Science as Psychology," *Amer. Pol. Sci. Review*, May, 1918; Ginsberg, "Psychology of Society" (1921); Rivers, "Psychology and Politics" (1923); Pillsbury, "Psychology of Nationality and Internationalism" (1919), ch. 2; Ford, "The Natural History of the State" (1915), ch. 4; Giddings, "Democracy and Imperialism" (1900), ch. 2 ("The Psychology of Society"); and Hobhouse, "Social Evolution and Political Theory" (1911).

<sup>37</sup> Barker, "Political Thought from Spencer to the Present Day," p. 149.

<sup>38</sup> "Modern Democracies," vol. I, p. 15.

<sup>39</sup> Compare Ward, "Psychic Factors of Civilization" (1906), p. 299.

<sup>40</sup> "Lois psychologiques de l'évolution des peuples," p. 6.

largely upon grounds of psychology.<sup>41</sup> Again, if we should attempt to explain why certain forms of government have worked successfully among some races and failed among others, why certain races have manifested a high degree of political capacity while others have not, and why the largest degree of liberty has been a boon to some peoples and brought ruin to others, we should probably find the explanation in the facts of race psychology.<sup>42</sup>

**Relation to Biology.**—It has been asserted that the state has a natural as well as a political history, this being a corollary of the Darwinian theory of evolution. The state, according to this theory, is "a phase of development from associations formed among animals of a species included in the subject matter of natural history."<sup>43</sup> Others go further still and argue that the state, like the individual, is a product of evolution; in structure it is an organism having many of the characteristics of a biological organism; and it grows, functions, and decays according to the natural laws which govern the growth and decay of organic bodies. Consequently biological laws are applicable to the study of the phenomena of the structure and life of the state. In short, political science is a biological science.

Of those who have undertaken to explain the organization and life of the state in terms of biology, Herbert Spencer is one of the most conspicuous examples. He maintained that in structure and formation the state bears a close analogy to biological organisms, that it possesses organs analogous to those of animals, and that many of the

<sup>41</sup> Compare Fillwood, "A Psychological Theory of Revolutions," *Amer. Jour. of Sociology*, vol. XI, p. 49.

<sup>42</sup> Recently psychology has come to play an important part in the army, in the courts of justice, and in the administration of government. Compare Merriam, "New Aspects of Politics," p. 76, and Gosnell, "Some Practical Applications of Psychology to Politics," *Amer. Jour. of Sociology*, vol. XXVIII, pp. 935 ff.

<sup>43</sup> Ford, "The Natural History of the State" (1915), a work which undertakes to give a "detailed survey of connections between biology and politics" and "to examine the foundations of political science from the naturalistic point of view established by the publication of Darwin's 'Origin of Species' in 1859."

Huxley maintained that the state is an organism in the same sense that "communities of ants and bees" are. "The Individual in the Animal Kingdom," pp. 50, 142. But he did not, like Spencer, maintain that society is an organism in the sense that an animal is. See his essays on "Administrative Nihilism" and "Government."

functions which they discharge are comparable to those of animals.<sup>44</sup> In short, he attempted to bring political science into connection with biology, though it cannot be said that he was successful, since the two proved to be unwilling yokefellows. Nevertheless his attempt and those of others after him have exercised a considerable influence on political theory.<sup>45</sup>

**Relation to Geography.**—Many writers have dwelt upon the influence of geographical conditions in particular and physical environment in general upon the character and the national life of peoples, and some have attempted to demonstrate that national policies and even the structure and functions of governments have been influenced in large measure by such conditions. The influence of climate, topography, insularity, the character of the soil, the presence or absence of mountains, plains, rivers, and outlets upon the sea, has been emphasized by various political writers from Aristotle<sup>46</sup> to the present. Bodin in 1576 was the first modern writer to occupy himself with the subject.<sup>47</sup> Rousseau maintained that there is a relationship between the character of the climate and forms of government and asserted that warm climates are conducive to despotism, cold climates to barbarism, and moderate climates to a good policy.<sup>48</sup> Montesquieu in 1748 likewise dwelt at considerable length upon the influence of physical environment upon social and political institutions, and particularly

<sup>44</sup> See his "Principles of Sociology," his "Synthetic Philosophy," and especially his "Social Statics" and "Man *versus* the State."

<sup>45</sup> Compare Barker, *op. cit.*, pp. 14, 131. Among American and English writers who have attempted to apply the laws of biology to the study of social and political phenomena, may be mentioned Tenny, "Social Democracy and Population" (1902); Conklin, "Biology and Democracy" and the "Direction of Human Evolution" (1914); Bateson, "Biological Fact and the Structure of Society" (1916); Keller, "Social Evolution" (1915); Denby, "Biological Foundations of Society" (1924); and Hankins, article in *Pol. Sci. Quar.*, vol. XXXVIII, pp. 388-412. The last-named author has attempted a synthesis of differential biology and psychology with particular reference to the problem of the assumptions and policies of modern democracy. Tenny maintains that there is no incompatibility between democracy and the laws of biology. Conklin adopts the same view, maintaining that democracy does not require absolute equality in the biological sense, but only that the citizens shall be rated according to their merits. For the literature of the subject see Barnes, "Sociology and Political Theory," pp. 61-62.

<sup>46</sup> "Politics" (Trans. by Jowett), bk. VII, ch. 6.

<sup>47</sup> "De Republica," bk. V, ch. 1.      <sup>48</sup> "The Social Contract," bk. III, ch. 8.

upon liberty. Unlike Bodin, he laid less emphasis upon mere differences of latitude and longitude and more upon temperature, moisture, and the fertility of the soil. His conclusion was that mountainous regions and cold climates are conducive to slavery and despotism.<sup>41</sup>

Buckle in his "History of Civilization" (1849)<sup>50</sup> went to the extreme length of attributing to geographical influences the pre-dominant cause of the character and institutions of peoples. Rejecting what he called the "metaphysical dogma of free will" and the "theological dogma of predestined events," he asserted that the actions of men, and therefore of societies, are determined by a reciprocal interaction between the mind and external phenomena. Specifically, he maintained that it is not the free will of man which determines the actions of individuals and societies, but rather the influence of physical environment, particularly climate, food, soil, and the "general aspects of nature." Thus he attributed the differences between the character and institutions of Scandinavia on the one hand, and those of Spain and Portugal on the other, to differences of physical environment and geographical conditions. Similarly, he accounted for the civilization of ancient Egypt by the fertility of the soil. It is believed that Buckle greatly exaggerated the influence of climate, food, and soil upon individual and national character,<sup>51</sup> although he is not without defenders.<sup>52</sup>

In more recent years a host of scholars have discussed and emphasized the influence of physical and geographical factors upon individual character and upon political institutions and governmental policies. Among these may be mentioned Bluntschli,<sup>53</sup> Treitschke,<sup>54</sup> Ritter,<sup>55</sup>

<sup>40</sup> "The Spirit of the Laws," bks. XIV-XVI.

<sup>50</sup> Vol. I, ch. 2.

<sup>51</sup> Compare Ripley, "The Races of Europe," p. 1.

<sup>52</sup> Robertson, "Buckle and His Critics" (1895) and Thomas, in Merriam, Barnes, and others, "Political Theories, Recent Times" (1924), p. 471. Hume, in his essay on "National Character" (Essays, vol. I, p. 21), denied that climatic conditions affect in any considerable measure national character. "I do not believe," he said, "that man ever in his spirit or destiny owed any thanks to atmosphere, food or climate." Ratzel, in his "Anthropogeographic," pp. 43-45, answers Hume.

<sup>53</sup> "Theory of the State," bk. III, chs. 1-3 (Oxford translation, 1892).

<sup>54</sup> "Politics," vol. I, pp. 210-218.

<sup>55</sup> See Gage, "Ritter's Geographical Studies."

## RELATION TO GEOGRAPHY

Ratzel,<sup>56</sup> Reclus,<sup>57</sup> McKinder,<sup>58</sup> and Huntingdon.<sup>59</sup> Other writers whose researches and writings have contributed to give "political geography" a standing among the sciences may be mentioned : Keltie,<sup>60</sup> Ripley,<sup>61</sup> Geddes,<sup>62</sup> Semple,<sup>63</sup> Brunhes,<sup>64</sup> and J. Russell Smith.<sup>65</sup> Many writers, especially the earlier ones such as Bodin, Rousseau, Montesquieu, and Buckle, undoubtedly exaggerated the influence of physical factors of climate, and the more recent "political geographers" have not entirely avoided the same error.<sup>66</sup>

Nevertheless when due allowance is made for exaggeration it remains undoubtedly true that geographical conditions have influenced in considerable measure the determination of national policies and to some extent the character of political institutions.<sup>67</sup> It is generally admitted, for example, that the geographical disunity of ancient Greece

<sup>56</sup> "Anthropogeographic" (2d ed., 1899 and 1912) ; "Die Politische Geographie" (1898) ; "Der Staat und sein Boden" (1897) ; "Die Vereinigten Staaten von Nordamerika" (1878-80) ; and other works.

<sup>57</sup> "Nouvelle géographie universelle" (19 vols., 1875-1884) and "L'homme et la terre" (6 vols., 1905-1908).

<sup>58</sup> "Democratic Ideals and Reality, a Study in the Politics of Reconstruction" (1919).

<sup>59</sup> "The Pulse of Asia" (1907) ; "World Power and Evolution" (1919) ; and various other works. "Whatever the motive power of history may be," says Huntingdon, "one of the chief factors in determining its course has been geography, and among geographic forces, changes of climate have been the most potent for both good and bad." "Pulse of Asia," p. 15. The views of these writers are summarized by Thomas in Merriam, Barnes, and others, "Political Theories, Recent Times," ch. 12, and by Brunhes in Barnes (editor), "History and Prospects of the Social Sciences" (1925), ch. 2.

<sup>60</sup> "Applied Geography."

<sup>61</sup> "The Races of Europe" and "Geography as a Sociological Study," *Pol. Sci. Quarterly*, Dec. 1895.

<sup>62</sup> "Influence of Geographical Conditions on Social Development," *Geographical Journal*, 1898.

<sup>63</sup> "American History and Its Geographical Conditions." Freeman, in his "Methods of Historical Study" (p. 57), and Bryce, in an article entitled "Relation of Geography to History" (*Contemp. Review*, vol. LXII), have emphasized the importance of political geography in the study of history.

<sup>64</sup> "Géographic humaine."

<sup>65</sup> "Human Geography," 2 vols. (1922). See also George, "Relations of Geography and History" (1907).

<sup>66</sup> As Duguit aptly remarks, there is a disposition among geographers to-day to attribute all historical events to the influence of geographical conditions. "Souveraineté et liberté" (1922), p. 28.

<sup>67</sup> Compare Bryce ("Mod. Demos." I, 166), who remarks that "in any country physical conditions and inherited institutions so affect the political development of a nation as to give its government a distinctive character."

prevented the development of political unity,<sup>68</sup> that the mountainous and landlocked character of Switzerland has influenced in some degree the history and institutions of that country,<sup>69</sup> that the control of river mouths has affected the relations between various countries, etc. It might also be shown that the history of the Netherlands has been influenced in large measure by the peculiar geographical conditions of the country and the heroic struggle of her people with nature.<sup>70</sup> It has been often asserted that the insularity of England has made it necessary for that country to be a sea power and to enter into alliances with foreign countries.<sup>71</sup> Similarly, German writers have frequently asserted that it was the geographical position of Germany, situated as she is in the center of Europe and without natural boundaries on several of her frontiers, which made it necessary that she should be a strong military power. This position, says Professor Hintze of the University of Berlin, "is the decisive factor in our political geography," nor would "it be difficult to trace much of our peculiar political character to this same source." And he adds: "Our historico-political destiny lies in our geographical position."<sup>72</sup>

It is hardly necessary to state that the industries and economic

<sup>68</sup> Oman, "History of Greece," ch. I.

<sup>69</sup> Treitschke, "Politics" p. 214, goes to the length of asserting that "the federal constitution of Switzerland is partly the result of the physical configuration of the country." Shaler ("Nature and Man in America," p. 156) attributes to the "geographical conditions which environ its folk" the fact that the Swiss have maintained their "local life undisturbed by the powerful states about it for more than a thousand years."

<sup>70</sup> So asserts Keltie, "Applied Geography," p. 7.

<sup>71</sup> For example, by MacKinder, "Democratic Ideals, a Study in the Politics of Reconstruction." Compare also Shaler ("Nature and Man in America," pp. 153, 159), who emphasized the importance of a "trifling geographical incident"—the existence of the English Channel—upon the history of England. "The independent political development of England for the last thousand years," he said, "has been in large part due to the measure of protection afforded by the British Channel." Compare also Treitschke ("Politics," I, pp. 212 ff.), who attributed much of the difference between ancient Athens and Sparta to the fact that the latter was a landlocked state while the former had access to the sea. Treitschke emphasized also the importance of "variety of physical configuration," of "geometric formation" (contiguity), of "sea boundaries," of "good boundaries," etc. (*ibid.*, 215 ff.).

<sup>72</sup> "Germany and the World Powers" in "Modern Germany in Relation to the Great War," being an English translation by Whitelock of a collection of essays by German scholars, entitled "Deutschland und der Weltkrieg," 1916, pp. 10, 13. See also Professor Troeltsch, *ibid.*, p. 71, to the same effect.

pursuits of the people of a particular country are determined in large measure by the geographical situation and geological foundations and these in turn predetermine in some degree the history of the country.<sup>73</sup> Professor Seligman goes to the length of asserting that the "so-called Anglo-Saxon individualism is largely the product of climatic conditions." The whole theory of individualism, he maintains, "was a natural result of the economic, and at bottom, of the climatic, conditions of a new environment."<sup>74</sup>

#### **Relation to Ethnology, Ethnography, and Anthropology.—**

Recent researches by learned scholars in ethnology, ethnography, and anthropology have produced a large amount of knowledge which throws much light upon certain problems with which the political scientist has to deal, such as the problems of origins, the character of primitive organization, and important questions relating to nationality. Ethnology, says Krauth-Fleming, investigates the organization and laws which depend upon the racial and physical differences of peoples, and seeks to deduce from them results and principles of guidance in the important relations of social and national life. It is especially with the organization of new states and the consolidation or division of existing states that ethnological factors play an important rôle. Ethnology, says another leading scholar in this field, "is the necessary basis of correct history and sound statesmanship. It offers to history a foundation on natural law; it explains events by showing their dependence on the physical structure, the mental peculiarities, and the geographic surroundings of the peoples engaged in them. . . . To the statesman it offers those facts about the capacities and limitations of peoples which should guide his dealings with them."<sup>75</sup>

Ethnography, which bears somewhat the same relation to ethnology that geology does to geography, is regarded by some writers as a discipline of political science. Similarly, anthropology, in so far as it

<sup>73</sup> Compare Ripley, "Races of Europe," p. 4.

<sup>74</sup> "Principles of Economics," pp. 36-40.

<sup>75</sup> Brinton, "Races and Peoples," p. 300. Compare also Ratzel, "Politische Geographie," p. vi.; Ratzenhofer, "Wesen und Zweck der Politik," vol. I, p. 37; and Catlin, "The Science and Method of Politics" (1927), pp. 189-196. As to the contributions of ethnology and the literature relating thereto, see Hankins in Merriam, Barnes, and others, "Political Theories, Recent Times," ch. 13.

deals with the origin, classification, and relations of races, likewise throws light upon certain of the problems with which the political scientist is concerned.<sup>76</sup>

<sup>76</sup>The anthropological theories of political origins and the literature of the subject are reviewed by Goldenweiser in Merriam, Barnes, and others, *op. cit.*, ch. 11, and by the same author in Barnes (editor), "History and Prospects of the Social Sciences" (1925), ch. 5. See also Barnes, "Sociology and Political Theory," pp. 57-59.

## CHAPTER IV

### THE NATURE OF THE STATE

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#### I. TERMINOLOGY AND DEFINITIONS

The Term "State."—Political science, as we have seen, deals with the phenomena of that highest of all human associations, the state. The term employed by the Greeks which corresponds most nearly to the modern English term "state" was *polis*, meaning "city." For

them, the term was appropriate enough because their states were city-states, not territorial or country states such as most of those of modern times are. In short, as Seeley remarked, political science was for the Greeks largely municipal science. The Romans employed term *civitas*, which connoted the same idea. But they also employed the phrases *status rei publicae* and *res publica*, which implied not merely the idea of citizenship of a city but the notion of the public welfare. The terms probably conveyed to the Roman mind of the fifth century after Christ a meaning very similar to our modern notion of a state. The early Teutons adopted only a part of the phrase, *status*, from which the modern word "state" was derived.<sup>1</sup> In early modern times the coming into use of such German words as *Landtag*, *Landesgesetz*, and *Landesstaatsrecht* indicated the new conception of the state as a territorial rather than an urban commonwealth.<sup>2</sup> The word "state" (*stato*) appears to have been introduced into the modern literature of political science by Machiavelli, who in his famous book, "The Prince" (*Il Principe*, 1523) observed at the outset that "all the powers which have had and have authority over men are *states* (*stati*) and are either monarchies or republics."<sup>3</sup> In the course of the sixteenth and seventeenth centuries the words *state*, *état*, *Staat* appeared in English, French, and German literature, although Bodin 1576 preferred the term "republic" (*république*) as the title of the French edition of his famous treatise.<sup>4</sup>

**Various Uses of the Term.**—Etymologically the term is an abstract one which has reference to that which is fixed or established. Thus we speak of the "state" of a man's health, of his mind, or of his economic condition. The etymological connotation does not therefore correspond to the meaning of the word as a term of political science. Unfortunately, like many other words of common usage in the literature of political science and law, it is used in various senses. Thus it is often employed as a synonym of "nation," "society," "country," "government," etc. It is commonly employed also to express the idea of the collective action of society as distinguished from individual

<sup>1</sup> Jenks, "Law and Politics in the Middle Ages" (1898), p. 71. Compare also Bluntschli, "Theory of the State," p. 23, note 1.

<sup>2</sup> Jellinek, "Recht des modernen Staates," p. 125.

<sup>3</sup> Chapter I.

<sup>4</sup> Grotius, on the other hand, used the term *civitas* in his "De jure belli ac pacis" (1625), as Bodin did in the Latin edition of his work.

action, as when we speak of "state" aid to education, "state" regulation of industry, etc. Again, in some countries having the federal system of government, such as the United States (and the German Empire of 1871-1918),<sup>5</sup> the term is used to designate both the federation as a whole and the component members constituting it. The effect of this dual use of the term is to introduce confusion into the terminology of political science and it sometimes leads to misconceptions in political thinking.<sup>6</sup> It is regrettable that neither the English, nor the German, nor the French language contains a suitable term by which the component members of federal unions may be appropriately designated. They are not, strictly speaking, "states" nor yet are they mere provinces or administrative districts, at least not in the American, Canadian, or Australian federal unions.

Likewise the use of the terms "state" and government," as if the two things were identical, has produced equal confusion and often misunderstanding. In fact they represent widely different concepts and upon the recognition of the distinction between them depends the true understanding of some of the most fundamental questions of political science. The state is the politically organized "person" or entity for the promotion of common ends and the satisfaction of common needs, while the government is the collective name for the agency, magistracy, or organization through which the will of the state is formulated, expressed, and realized. The government is an essential organ or agency of the state, but it is no more the state itself than the board of directors of a corporation is itself the corporation.<sup>7</sup> In

<sup>5</sup> In the new constitution of Germany (1919) the component members of the republic (*Reich*) are no longer designated as "states" (*Staaten*) but as "lands" (*Länder*). Rousseau, in his "Le contrat social" (bk. I, ch. 6), suggested the employment of the term "state" when the commonwealth is conceived as *passive*; the term "sovereign" when it is thought of as *active*; and the term "power" when it is compared with its equals.

<sup>6</sup> Burgess in his "Political Science and Constitutional Law," dwells upon the confusion and inaccuracy resulting from this dual use of the term "state", and seeks to avoid it himself by designating the individual members of federal unions as "commonwealths" and by restricting the use of the word "state" to the federation as a whole. Cf. also Woolsey, "Political Science," vol. I, p. 141, and Jellinek, *op. cit.*, p. 129.

<sup>7</sup> The term "government" is itself frequently used in different senses. Thus it is employed to designate the entire organization or system, legislative, executive and judicial, through which the will of the state is formulated, expressed, and

earlier times, it was not uncommon to identify the ruling sovereign with the state, and the famous saying attributed to Louis XIV (*L'état, c'est moi*) has often been quoted as an example of such identification. But if the government and state were identical, the death of the reigning sovereign or the overthrow of the government would necessarily interrupt, if not destroy, the continuity of the state life.<sup>8</sup> As a matter of fact changes of governmental organization do not affect the existence of the state. States possess the quality of permanence. Governments, on the contrary, are not immortal; they are constantly undergoing change as a result of revolution, or through legal processes, yet the state continues unimpaired and unaffected. Governments are mere "contrivances" to use the language of Professor Seeley, through which the state manifests itself. They possess no sovereignty, no original unlimited authority, but only derivative power delegated by the state through its constitution. To understand clearly, therefore, the nature of each and the relation of one to the other, we must avoid identifying them either in thought or in treatment.

The term "state" is also frequently employed as a synonym for "society." Thus it is said that society has a right to protect itself against crime, when it is the state that is meant. Society is the more general term meaning the people, viewed in their associated aspect, that is, an aggregation having common interests and united by what the sociologists term a "consciousness of kind," whereas the state is a particular portion of society politically organized for the protection and promotion of its common interests. The principal difference between society and the state, therefore, is that the latter necessarily

executed. It is also employed in a more restricted sense in countries having the parliamentary system to designate the cabinet or ministry. Thus in Great Britain one speaks of Lloyd George's "government," the defeat of the "government," the Liberal "government," etc.

<sup>8</sup> Compare Jellinek, "Recht des modernen Staates," p. 140. The Supreme Court of the United States in the case of *Poindexter v. Greenhow* (114 U. S. 270) thus distinguished between the state and the government: "In common speech and common apprehension they are usually regarded as identical; and as, ordinarily, the acts of the government are the acts of the state (because within the limits of its delegation of power), the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immovable. The government is an agent, and within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation."

implies political organization, while the former does not.<sup>9</sup> Spencer described the state as "society in its corporate capacity."<sup>10</sup>

**What Is the State** —From a consideration of matters of terminology we come now to inquire what is the state. Definitions of the state are, as the German writer Schulze remarked, innumerable, almost every author having his own and scarcely any two being alike.<sup>11</sup> Aristotle, the "father of political science," defined the state as "a union of families and villages having for its end a perfect and self-sufficing life, by which we mean a happy and honorable life."<sup>12</sup> If, he said, "all communities aim at some good, the state or political community, which is the highest of all and which embraces all the rest, aims, and in a greater degree than any other, at the highest good."<sup>13</sup> As a general statement of the primary object of the state it can hardly be improved upon. Cicero defined the state (*respublica*) as "a numerous society united by a common sense of right and a mutual participation in advantages."<sup>14</sup> His definition commended itself to Grotius, who defined the state (*civitas*) somewhat similarly as "a perfect society of free men united for the sake of enjoying the advantages of right and the common utility,"<sup>15</sup> and his definition in turn was adopted in substance by Vattel<sup>16</sup> and Wheaton.<sup>17</sup> Bodin, in 1576, defined the state (*la république*) as "an association of families and their common posses-

<sup>9</sup> Barker (*op. cit.*, p. 67) remarks that society and the state have the same moral purpose. Consequently they "overlap, they blend, they borrow from one another. But roughly, we may say that the area of the one is voluntary coöperation, its energy that of good will, its method that of elasticity; while the area of the other is rather that of mechanical action, its energy, force, its method, rigidity." MacIver ("Community," 1917, p. 5) says, "Wherever living beings enter into, or maintain, willed relations with one another, there society exists." Again he points out that the state exists *within* society and that it is not the *form* of society. "The Modern State," p. 5.

<sup>10</sup> "Data of Ethics," pp. 186, 221. Ford ("Natural History of the State," p. 158) says "the state and society may be regarded as the same entity, in the one case considered in its collective aspect, in the other in its distributive aspect."

<sup>11</sup> *Deutsches Staatsrecht*," bk. I, p. 15.

<sup>12</sup> "Politics," Jowett's translation, p. 120.

<sup>13</sup> *Ibid.*, p. 25.

<sup>14</sup> "De Republica," bk. I, p. 25.

<sup>15</sup> "De Jure Belli ac Pacis," bk. I, ch. 1, sec. 13.

<sup>16</sup> "Droit des gens," vol. I, sec. 1.

<sup>17</sup> "Elements of the Law of Nations," ch. 2, sec. 2. But Cicero's definition is criticized by Calvo, "Droit international," vol. I, p. 168, and by Pradier-Fodéré, "Traité de droit int. pub.," vol. I, p. 146.

sions, governed by a supreme power and by reason."<sup>18</sup> Thus, like Aristotle, he made the family rather than the individual the unit.

**Modern Definitions of the State.**—Among the definitions given by modern authorities the following are among the most satisfactory. The English writer Holland defines a state as a "numerous assemblage of human beings, generally occupying a certain territory, among whom the will of the majority or of an ascertainable class of persons is by the strength of such a majority or class made to prevail against any of their number who oppose it."<sup>19</sup> Hall, viewing the state primarily as a concept of international law, says, "The marks of an independent state are that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control."<sup>20</sup>

Burgess defines it as a "particular portion of mankind viewed as an organized unit,"<sup>21</sup> which is substantially the same as the definition given by Bluntschli, who says, "The state is the politically organized people of a definite territory."<sup>22</sup> The United States Supreme Court in an early case defined a state as "a body of free persons united together for the common benefit, to enjoy peaceably what is their own, and to do justice to others."<sup>23</sup> More recently it has defined the state as "a political community of free citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed."<sup>24</sup> Esmein, regarding it from the point of view of the jurist, defines the state as "the juridical personification of a nation."<sup>25</sup> Duguit defines it uniquely as "a human society in which there exists a political differentiation, that is, a differentiation between the governed and the governors."<sup>26</sup> Carré de Malberg defines the state concretely as "a community of men fixed on a territory which is their own and possessing an organization from which results, for the group envisaged

<sup>18</sup> "Six livres de la république," bk. I, ch. 1.

<sup>19</sup> "Elements of Jurisprudence" (6th ed.), p. 40.

<sup>20</sup> "International Law" (3d ed.), p. 18.

<sup>21</sup> "Political Science and Constitutional Law," vol. I, p. 50.

<sup>22</sup> "Allgemeine Staatslehre," vol. I, p. 24.

<sup>23</sup> *Chisholm v. Georgia*, 2 Dall. 456.

<sup>24</sup> *Texas v. White*, 7 Wall. 700.

<sup>25</sup> "Droit constitutionnel," p. 1.

<sup>26</sup> *Traité de droit const.*, (1911), vol. I, p. 22.

in its relations with its members, a superior power of action, of command, and of coercion."<sup>27</sup>

Phillimore says a state for all purposes of international law is "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising through the medium of an organized government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into all international relations with the communities of the globe."<sup>28</sup>

**Conclusion.**—If one more definition may be added to this long list I would say that the state, as a concept of political science and public law, is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent, or nearly so, of external control, and possessing an organized government to which the great body of inhabitants render habitual obedience. The essential constituent elements, political, physical, and spiritual, of the modern state are all brought out in this definition. They are : first, a group of persons associated together for common purposes ; second, the occupation of a determinate portion of the earth's surface which constitutes the home (or, as the Germans say, the *Boden*) of the population ; third, independence of foreign control ; and fourth, a common supreme authority or agency through which the collective will is expressed and enforced.

**Factors Determining Definitions : Points of View.**—Naturally definitions of the state are colored by the opinions of their authors and are affected by the point of view from which the state is envisaged. Thus the sociologist, viewing it primarily as a social phenomenon, usually defines it differently from the way in which the jurist, who regards it first of all as a juridical establishment, usually defines it. Similarly, writers on international law in their definitions emphasize certain elements which the political scientist ignores or minimizes. Finally, philosophical writers who think and write in abstract terms formulate their definitions accordingly. Such, for example, were the definitions of Hegel, who defined the state as "the incorporation of

<sup>27</sup> "Théorie générale de l'état" (1920), vol. I, p. 7.

<sup>28</sup> "International Law" (3d ed.), vol. I, p. 81.

the objective spirit"; as "the ethical spirit, the manifest, self-conscious, substantial will of man, thinking and knowing itself and suiting its performance to its knowledge or to the proportion of its knowledge"; as "the actualization of concrete freedom"; as "perfected rationality"; as "the realization of the moral idea," etc.<sup>29</sup>

The objection to such definitions is that they are, aside from their highly abstract character, based on a one-sided view of the state and afford little clue to its real character and mission.

In attempting to define the state we should do well to remember that it is at the same time both an abstract conception and a concrete organization. Abstractly considered, it is merely a juridical person, a corporation, separate and distinct from the people who, with the territory which they occupy, constitute the physical state. On the other hand, the state concretely considered is the community, the territory which it occupies, and the organization through which it wills and acts. Thus viewed, the state is identified with the physical elements which are said to constitute it.<sup>30</sup> Some writers conceive it only from the first viewpoint; others, denying the personality theory, regard it only from the second point of view.<sup>31</sup>

**The Idea and the Concept of the State.**—Political philosophers have often discussed the "idea" and some have distinguished it from the "concept" of the state. The term "idea" as thus used connotes several meanings. Thus the state, when considered apart from its concrete physical existence, is sometimes referred to as an abstract "idea." Again it is spoken of as existing in "idea" before it has acquired an objective form with an organization and institutions. Thus Hegel said the "idea" of the state has "immediate actuality in the individual state,"<sup>32</sup> by which he apparently meant that it is merely a thing of philosophical speculation until it "takes flesh and blood" and becomes a working institution serving the needs of the community.<sup>33</sup>

<sup>29</sup> See Morris, "Hegel's Philosophy of History," pp. 79 ff.

<sup>30</sup> Carré de Malberg ("Théorie générale de l'état," vol. I, p. 8) criticizes this identification. Territory, population, and the organized machinery of government, he says, are only the conditions of the formation of the state; i.e., the state is merely the resultant of these factors and should not itself be confused with them.

<sup>31</sup> The personality theory is discussed more at length in ch. X (*infra*).

<sup>32</sup> "Philosophy of History" (Eng. Trans. by Morris), p. 83.

<sup>33</sup> Compare Vaughan, "History of Political Philosophy" (1925), vol. II, p. 175.

Other writers, for the most part Germans, distinguishing between the idea (*Idee*) and the concept (*Begriff*) of the state, employ the term *Staatsidee* to designate the ideally perfect state as distinguished from the imperfect actual state, that is, the state as a concept. Some of them appear to regard the ideally perfect state as a universal state. Thus Bluntschli said, "the concept of the state (*Staatsbegriff*) has to do with the natural and essential characteristics of actual states. The idea of the state (*Staatsidee*) presents a picture, in the splendor of imaginary perfection, of the state as not yet realized but to be striven for."<sup>34</sup> Burgess adopts this distinction between the "idea" and the "concept" of the state. He says : "The idea of the state is the state perfect and complete. The concept of the state is the state developing and approaching perfection. From the standpoint of the idea, the state is mankind viewed as an organized unit . . . From the standpoint of the concept, it is a particular portion of mankind viewed as an organized unit. From the standpoint of the idea the territorial basis of the state is the world, and the principle of unity is humanity. From the standpoint of the concept, again, the territorial basis of the state is a particular portion of the earth's surface, and the principle of unity is that particular phase of human nature and of human need, which at any particular stage in the development of that nature is predominant and commanding. The former is the real state of the perfect future. The latter is the real state of the past, the present, and the imperfect future."<sup>35</sup> The distinction is largely metaphysical or philosophical and has little practical value. The view that the ideal state—"the state of the perfect future"—is the universal state, will, of course, find numerous combatants.

**The State as a Concept of International Law.**—The state as often defined by writers on political science and constitutional law is not necessarily a state in the sense in which the term is used in the literature of international law. Conversely, a state in the latter sense

<sup>34</sup> "Theory of the State," p. 15. Elsewhere Bluntschli refers to the state as "organized mankind."

<sup>35</sup> "Political Science and Constitutional Law," vol. I, p. 49. See also Willoughby, "The Nature of the State" (1896), pp. 14-15, and "Fundamental Concepts of Public Law" (1924), pp. 16-17. Hegel (*op. cit.*, p. 82) likewise appears to have regarded the "idea" of the state as the state universal—the state "progressively actualizing itself in the process of universal human history."

may lack some of the attributes of a state as a concept of political science and constitutional law. Thus writers who do not consider sovereignty as an essential constituent element of the state regard members of federal unions, protectorates, so-called vassal states under the suzerainty of other states, states under mandates, and autonomous dependencies like the British self-governing dominions, as states, although they are not fully such in the eye of international law. Likewise, there is a group of petty states such as San Marino and Liechtenstein which, although sovereign and possessing the other marks of a state when judged by the criteria of political science, are not regarded as full international persons. A state in the sense of international law must be a fully sovereign and independent community with a legal capacity to enter into international relations, and must possess the power and will to fulfil the obligations which international law requires of all members of the family of nations. Furthermore, it must have been recognized as such and thereby admitted to membership in the international community on a footing of equality with other states. A community therefore may possess all the marks of a state as usually defined in terms of political science, but until it has been received into the family of nations it is not a state according to international law. International law does not deny the existence of a state before it has been recognized, but it simply takes no notice of it. Thus the Ottoman Empire was not admitted to participate in the benefits of the European system of public law until 1856, while China and Japan were not recognized as full members of the international community until a still more recent date. Although Russia has long been a member, there is at present a disposition to treat her as being outside the circle because of the refusal of the Soviet government to recognize the validity of the international engagements and obligations entered into by the former governments of Russia.<sup>36</sup>

**Is the League of Nations a State?**—The recent establishment of a new international political entity known as the League of Nations has given rise to much discussion as to its exact juristic character.

<sup>36</sup> As to the concept of the state as an international person see Oppenheim, "International Law" (3d ed.), pp. 125-129 and 134-139; Cobbett, "Leading Cases on International Law" (3d ed.), p. 47; Willoughby, "Fundamental Concepts of Public Law," ch. 17; and Crane, "The State in Constitutional and International Law."

Some of its friends have maintained that it is a state, at least in the sense of international law, that is, an international person, while some of its critics have attacked it on the ground that it is a "super-state" erected over the individual states which compose its membership. It is a creation having executive, administrative, and quasi-legislative organs ; it has brought about the establishment of a court which may be regarded, in a sense at least, as the judicial organ of the League ; it has a seat or capital, a treasury, a budget, it owns buildings and other property ; it can probably sue in the courts and be sued, at least with its consent ; it is said to have the right of legation, since in fact several members of the League have accredited permanent quasi-diplomatic representatives to it and occasionally it sends temporary missions to other states ; its representatives and officials by article 7 of the covenant are declared to be entitled to diplomatic privileges and immunities when engaged on the business of the League ; it is said to exercise the right of sovereignty, for example, over the Saar basin and the territories under mandate ; it exercises the power of intervention for the protection of minorities in certain states ; it exercises the power of a protectorate, for example, over Danzig ; it has the power to declare war and make peace ; etc.<sup>37</sup>

**The League Not a State.**—On the other hand, it is argued that the League cannot be properly regarded as an international person, or state, for the reason that it has no territory of its own over which it can exercise jurisdiction, no power to issue commands and enforce obedience, and if it had, it possesses no subjects to whom it could address such commands. As to the right of legation attributed to it, it has been pointed out that it is at best only a very imperfect right,

<sup>37</sup> Among those who regard the League as an international person, for the above-mentioned reasons, may be mentioned Oppenheim, *Rev. de droit int. pub.*, 2d ser., vol. I, 1919, p. 237 ; Schücking and Wehberg, "Die Satzung des Völkerbunds," pp. 61 ff.; Rougier, *Rev. gén. de droit int. pub.*, vol. XXXIII, 1921, p. 200 ; Fauchille, *Droit int. pub.*, 1922, vol. I, pt. I, p. 215 ; Larnaude, "La société des nations," 1920 ; Kleinizes, "La société des nations et l'état," 1921 ; Brunet, "La société des nations et la France," 1921. Compare Bourgeois, in Scelle, "Le pacte des nations" (1919), pp. viii-x. Mr. E. A. Harriman, in a recent book "The Constitution at the Cross Roads" (1925), maintains not only that the League is "a political society," a "legal person" with some control over its members, but that since these members are sovereign nations it is a "super-state." See also his note in the *Amer. Pol. Sci. Rev.*, Jan. 1927, p. 137. This view is apparently approved by David Jayne Hill, *Amer. Jour. of Int. Law*, April, 1926, pp. 415 ff.

since the League has no legal capacity to accord diplomatic privileges to persons accredited to it, nor to protect those to whom it is promised, nor any power to refuse to receive a particular person because he is *persona non grata* or for other reasons. Its right to declare war is nothing more than the right of the council to recommend to the members military action and if in their discretion they act upon the recommendation the war is carried on not by the League but by the participating members. Its alleged right of sovereignty over the Saar basin is not such in strict legal theory but merely the right of provisional government and trusteeship, the *de jure* sovereignty remaining in the German state. The situation is essentially the same in respect to the mandated territories, the sovereignty over them belonging either to the mandatory power or to the mandated state.<sup>38</sup> In either case the rôle of the League is merely that of supervision—the duty to see, so far as it can, that the mandatory power exercises its control in accordance with the terms of the mandate and for the benefit of the inhabitants.

As to the right of intervention in behalf of racial, linguistic, or religious minorities, that is nothing more than the right to use good offices and moral influence or to recommend military action by the members of the League. Finally, the alleged League protectorate over Danzig is not such in fact, and it is pointed out that the control of the foreign relations of the free city has been entrusted to Poland, who exercises it not on behalf of the League or even of the free city, but in the interest of Poland herself.

For these reasons it is denied that the League is an international person, that is, a state in the sense of international law.<sup>39</sup> The better

<sup>38</sup> There is a difference of opinion as to this. See Q. Wright, "Sovereignty of the Mandates," *American Jour. of Int. Law*, XVII, 1923, p. 698. See also his editorial, *ibid.*, 1924, pp. 306 ff., and the opinions there cited.

<sup>39</sup> This view is maintained by Rolin, *Rev. de droit int. et de lég. comp.* 1920, p. 334; by Huber, *Zeitschrift für Völkerrecht*, 1922, p. 11; and Makroski, *Rev. gén. de droit int. pub.*, 1923, p. 215. See also Voorhees, *Amer. Pol. Sci. Review*, vol. XX (1926), p. 847.

The whole question is luminously discussed by P. E. Corbett in a chapter entitled "What is the League of Nations?" in the *British Year Book of International Law*, 1924, pp. 119 ff. This author, while denying that the League possesses the right of legislation, of war and peace, of sovereignty, of intervention, etc., nevertheless concludes that it is "a person in international law" and as such is "the subject of rights and duties distinct from those of its members" (p. 147).

view is that the League is not a state, least of all a "super-state," according to either political science or international law, but is rather an association of independent states and self-governing dominions established for the accomplishment of specific objects. As such it approximates a state, in the sense of international law, more nearly than any other international association in existence. In the course of time it may possibly develop into an association possessing the attributes of a full-fledged international person, though it is difficult to see how it can ever evolve into a state, as the term is ordinarily defined in political science and constitutional law, without its involving the destruction, in part at least, of the individual member states composing it.

**Is the Papacy a State?**—Prior to 1870 the Holy See was a state and the pope was a temporal sovereign, as well as the ecclesiastical head of the Roman Catholic Church. In that year, however, the papal territories were secularized and incorporated in the new kingdom of Italy and thus the temporal sovereignty of the pope came to an end. Nevertheless, certain Catholic writers maintained that the papacy was still a state, although they admitted that it lacked some of the characteristics of other states.<sup>40</sup> They argued that although the papacy had

Compare also Butler, "Sovereignty in the League of Nations," *ibid.*, 1920-21, pp. 35 ff., where it is correctly denied that the League is a "super-state" or possesses the power of sovereignty. In the same sense see Williams, "The Status of the League of Nations in International Law," in *Report of the International Law Association*, 1925. The Supreme Court of the Union of South Africa in holding that the mandated territory of Southwest Africa is not a fully sovereign and independent state but is under the sovereignty of either the mandatory power, the principal allied and associated powers, or the League, denied that the League is either a "super state" or even a distinct international person, but maintained that it is in reality "an association of states which, while retaining their own sovereignty and status, have agreed with one another to pursue a certain line of conduct in international affairs as laid down in the covenant and to coöperate in certain matters of general concern. It functions through an assembly, a council, and a permanent secretariat, but none of these have any compulsory power over the individual states—it is not a state, it owns no territory, governs no subjects, and is not endowed with the attribute of sovereignty." *Christian v. Rex, Cape Times*, Dec. 1, 1923.

<sup>40</sup> As to the political and international status of the papacy in 1870-1829, see Fauchille, *op. cit.*, vol. I, pt. I, pp. 727 ff., and the bibliography there reproduced. See also Oppenheim, *op. cit.*, vol. I, pp. 181 ff.; Bompard, "Le pape et le droit des gens" (1888); Chrétien, "La papauté et la conférence de la paix," *Rev. gén. de droit int. pub.*, vol. VI, pp. 284 ff.; and the valuable article of M. Gidel,

lost its former territories it still possessed the Vatican with its grounds ; that in its officials, employees, and guards it had subjects ; that they were under the jurisdiction of the papacy alone ; that the papacy had its own governmental organization and judicial court ; that the pope was not subject to the king of Italy or any other temporal sovereign ; that he sent and received diplomatic representatives who were treated on an equal footing with other diplomatic representatives ; that he entered into agreements (concordats) with other states ; and that he was accorded (at least by Catholic powers) the honors of a temporal sovereign.

The better opinion, however, is that while the papacy was treated somewhat as if it were an international person, it was not such in fact and that it was still less a state according to political science. It was not invited to send plenipotentiaries to either of the two Hague Peace Conferences or to other international conferences later convoked. Moreover, the diplomatic representatives appointed by or accredited to the Vatican were charged only with interests of a religious character, and the concordats to which the papacy was a party dealt only with such matters.

All doubt as to whether the papacy was a state was removed, however, in 1929 by the conclusion of a treaty by which Italy recognized the sovereignty, ownership, and exclusive jurisdiction of the Holy See over the Vatican City, a small territory of 160 acres inhabited by about 400 persons.<sup>41</sup> Italy also recognized the right of the Holy See to send and receive diplomatic representatives according to the general provisions of international law. By an express declaration, however, the Holy See announced its intention of remaining aloof from all temporal disputes between nations and of refraining from participation in international congresses convoked for the settlement of such disputes, except upon special appeal from the contending parties.

## II. THE STATE DISTINGUISHED FROM OTHER ASSOCIATIONS

**Nature and Kinds of Associations.**—The state, as we have seen, is an association of human beings. It is not, however, the only

"Quelques idées sur la cond. int. de la papauté," *Rev. de droit int. et le lég. comp.*, vol. XVIII, pp. 589 ff.

<sup>41</sup> Texts in *Current History*, July, 1929, pp. 552 ff.

such association. Within the territorial limits of every highly civilized state are to be found an almost bewildering number of other associations, such as churches, labor unions, political parties, professional associations of various kinds, scientific bodies, learned societies, associations of public functionaries, and countless others. One of the striking facts of modern life, in fact, has been the tendency of men to unite themselves into group associations for the advancement of common social, scientific, religious, educational, political, economic, and other interests, with the result that to-day society is a veritable network of such associations. The state is no longer a mere "sand heap of individuals, all equal and unrelated, except to the state." Some of these associations embrace within their membership a large proportion of the adult population of the state ; many of them are international in scope, cutting across boundary lines and including in their membership persons of many countries.<sup>42</sup> Large numbers of men (and women) are members of more than one such association. All of them are organized ; many of them have treasuries and budgets, own property both real and personal, have statutes, by-laws, and rules of discipline, and exercise a certain control over their members. Many of them have charters of incorporation from the state and therefore possess what the lawyers call a juristic personality, but whether they have been thus recognized by the state or not, they have according to some writers a real, as contradistinguished from a hypothetical or fictitious personality.<sup>43</sup> Some of

<sup>42</sup> "Imagine," says M. Fouillée ("La science sociale contemporaine," p. 13), "a great circle within which are lesser circles combining in a thousand ways to form the most varied figures without overstepping the limits that inclose them : this is an image of the great association of the state and of the particular associations." If the "limits" here referred to mean territorial limits, this metaphor is, of course, false, since many associations are not circumscribed by state frontiers. Compare MacIver, "Community" (1917), p. 29. Speaking of these groups, Figgis ("Churches in the Modern State," 1913, pp. 87-88) says : "All of these groups (or many of them) live a real life ; they act towards one another with a unity of will and mind as though they were single persons ; they all need to be allowed reasonable freedom . . . they are all means by which the individual comes to himself."

<sup>43</sup> There has been much discussion as to the legal nature of such groups. Gierke ("Deutsches Genossenschaftsrecht," 1868-81) was the first jurist to maintain that they possess a real personality independent of their formal recognition as juristic persons by the state. Professor Maitland of England adopted Gierke's view. "There seems to be," he said, "a genus of which state and corporation are species ; they seem to be permanently organized groups of men ; they seem to be group

them, such as religious, charitable, and educational bodies, are occupied with interests in the advancement of which the state is itself concerned. Indeed, in some cases the state recognizes the fact that they are, in a sense, coöoperating partners with it in the pursuit of a common task and aids them by means of subventions from the public treasury.

**Differences between the State and Other Associations.**—But while there are striking similarities between the state and many other human associations, there are fundamental differences which distinguish them in their constitution, their functions, their power, and their ends. In the first place, membership in all such associations is a purely voluntary matter and a member is free to withdraw whenever he elects to do so, whereas membership in the state is compulsory and the citizen can throw off his membership only by expatriation.

In the second place, a man may belong to as many voluntary associations as he wishes, provided he can secure an election, but he cannot ordinarily be a recognized member of more than one state.

units; we seem to attribute acts and intents, rights and wrongs, to these groups, to these units." He suggested that we are slaves to a theory of the jurists when we endeavor to fix an immeasurable gulf between the state and other groups of men. See his introduction to the translation of Gierke's "Political Theories of the Middle Ages" (1900), especially p. ix; also his "Collected Papers," vol. III, pp. 304 ff. Dr. J. N. Figgis, in a plea for the autonomy of the churches, likewise attributes the quality of "personality" to such groups or associations as the church, composed of men bound together for the promotion of common interests. This "personality," he contends, is natural and is not derived from the fact that it has been formally conferred by the state. See his "Churches in the Modern State" (1913), ch. 2. Other writers who maintain a similar view are Barker, "Political Thought from Spencer to the Present Day," pp. 175 ff., who asserts that such groups possess a "juristic," if not a "real" personality, even before it has been recognized or conferred by the state; Laski, "The Problem of Sovereignty" (1917), "Authority in the Modern State" (1919), and "Grammar of Politics" (1925), especially ch. 7; MacIver "The Modern State" (1926), pp. 165 ff.; Krabbe, "The Modern Idea of the State"; and Sabine and Shepard's translation of the latter work (1922), pp. xi, ff. See also the articles by Lindsay, "The State in Recent Political Theory" and Barker, "The Discredited State," *Political Quarterly*, no. I (1914) and no. V (1915); and Paul-Boncour, "Le fédéralisme économique" (1901), especially pp. 1 ff. and 39 ff.

This view is of course contrary to the traditional and still generally accepted "concession" theory according to which the "personality" of a group is derived from the state either by express conferment or tacit recognition. Compare in this connection the decision of the English court in the Osborne case to the effect that a trade union in so far as it has corporate rights is a creation of statute law and not a mere "natural formation" as the opponents of the decision maintained. As to the traditional view see Maitland, *op. cit.*, p. xxxi.

In the third place, the association known as the state is confined within the circumscribed limits of a particular territory, whereas other associations are not territorially restricted but may, as stated above, extend beyond the political frontiers into foreign countries—indeed, they may extend over the entire world.

In the fourth place, the purpose of a voluntary association is limited to the pursuit of one, or at most, a few particular interests, whereas the state is concerned with a great and ever-increasing variety of interests. In short, it is charged with the care of general rather than particular interests.<sup>41</sup>

In the fifth place, many voluntary associations have only a temporary existence. They are formed for the accomplishment of particular ends and when these are achieved the association goes out of existence. Others disappear as a result of dissension or other causes. The state, on the other hand, is a permanent and enduring association. It is immortal; governments may come and go; the sovereignty may shift from one center to another, but the association continues forever. In this connection it may also be added that the state is a necessary association while the others are not. Men may and many do live without belonging to any one of the numerous voluntary associations, but they cannot live outside the state.

Finally, in the sixth place, and this is the most fundamental distinction of all, voluntary associations lack the legal power of coercion—the supreme power to command and enforce obedience—in short, the power of sovereignty. They cannot enforce their decisions upon recalcitrant members or punish them for disobedience. At best they can only employ the pressure of social disapprobation or expulsion. They cannot arrest, fine, imprison, or confiscate the goods of a state-breaking member, whereas the state can do all this, and more, in case its commands are disobeyed or its authority defied.

In this connection it is also important to remark that the legal right to form voluntary associations is not without limits. No civilized state would permit the formation or continued existence within its

<sup>41</sup> Compare Fournière, "L'individu, l'association et l'état," ch. I. As Maclver ("The Modern State," p. 179) points out, the peculiar function of the State—that which distinguishes it from other associations—is that it was created to establish and maintain order, a function which is neither claimed nor exercised by other associations.

borders of an association for criminal or highly immoral purposes or one whose objects were contrary to the public policy of the state. Examples of such prohibitions have not been lacking, and instances in which associations have been dissolved by command of the government have occurred in every state.

**Voluntary Associations Subject to the Control of the State.—**

All voluntary associations are subject to a certain control and regulation on the part of the state, even the churches and religious bodies. Some of them, naturally, are subjected to a more stringent control than others, among other reasons, for the purpose of protecting their members against the unlawful coercion of their governing bodies. In the United States we have seen the political parties, one of the most conspicuous examples of purely voluntary organizations, brought under strict state control, although for a century or more they were regarded as being entirely outside the sphere of state regulation. To-day their form of organization, the dates of their primary elections, their expenditures, their methods of voting, and even the qualifications for party membership are all regulated by the law of the state. Summing up, we may say that the policy of the state toward voluntary associations may be one of absolute prohibition, toleration, recognition (by conferring upon them a corporate capacity), regulation, or financial assistance. What the policy of the state ought to be in respect to voluntary associations cannot here be discussed. It is sufficient to say that from the standpoint of law they are subject to the control of the state equally with individuals; they can exist only with the consent of the state; and their activities may be regulated and controlled by it in the interest of and for the protection of the rights of the community.

**So-called Pluralistic Theories.—**The traditional doctrine of the unlimited and exclusive character of state sovereignty, and its corollary, the complete subjection to its authority of all other associations and groups within its territorial jurisdiction, has in recent years become an object of attack by a certain class of writers, known as "pluralists," guild socialists, syndicalists, and others. Briefly and generally stated, their argument is this: in consequence of the enormous multiplication of voluntary associations and groups for the promotion and care of industrial, political, and other interests, society has become more and more an aggregation of groups and less and less

an association of individuals.<sup>45</sup> It is, we are told, no longer the old individualistic principle of man *versus* the state, but the group *versus* the state. The individual who belongs to one of these groups possesses a double allegiance and loyalty,—one to the state and one to the group of which he is a member,—and in case of conflict each may assert a superior claim to his allegiance. These groups, they argue, should be recognized as possessing distinct natural corporate personalities independent of any creative act on the part of the state. Many of them are engaged in the pursuit of interests identical with or closely related to some of those which the state is pursuing. Indeed, the sum total of their organized corporate action greatly exceeds that of the state,<sup>46</sup> and it is denied that the state is necessarily a more important association than some of the others found within its territorial limits.<sup>47</sup> The state ought not, therefore, to be regarded as if it were the sole all-sufficing, indispensable association over and above the others and to which the latter are completely subject.<sup>48</sup> It is merely one of a number of associations, and has no superior claims to the individual's allegiance; they are both, as Maitland said, species of the same genus. The state, it is admitted, is in some respects an association *sui generis*, but its rôle should be rather that of an umpire for deciding conflicts between the other associations than a common regulator of their particular affairs. A wide autonomy should, therefore, be recognized as an inherent natural right of all such associations. As Barker<sup>49</sup> and Laski<sup>50</sup>

<sup>45</sup> See Barnes, "Sociology and Political Theory" (1924), p. 30, and the opinions there cited.

<sup>46</sup> Cole, "Self-Government in Industry" (1917), p. 120.

<sup>47</sup> Burns, "The Morality of Nations" (1916), p. 36.

<sup>48</sup> It should not be regarded as "a single unique entity existing alone in a circumambient void." Cole, "Social Theory" (1920), p. 81. Compare also Duguit ("L'état, les gouvernants et les agents," 1903, pp. 133-134), who approves the view, which he says is also that of Gierke and Preuss, that the state is "only one social form of the same nature as the others." The sociologist Durkheim held a similar opinion. See Barnes, "Durkheim's Contributions to Political Theory," *Polit. Sci. Quar.*, vol. XXV (1920), pp. 236 ff. See also Follett, "The New State" (1918), where it is argued that "pluralism is the most vital trend in political thought to-day" (p. 10), and that "the ignoring of the group by the state in retarding our political development," p. 152. This author, however, does not go to the length which some pluralists do, of proposing a division of the powers of sovereignty among the state and other groups.

<sup>49</sup> *Op. cit.*, p. 181.

<sup>50</sup> "Grammar of Politics" (1925), ch. 7. See also "Problem of Sovereignty"

phrase it, society should be "federally" organized : that is, the power of regulation as now asserted and exercised by the state should be, in large measure at least, surrendered and divided among the groups themselves, each being allowed to "legislate for itself within the ambit of the general level at which the society broadly aims."<sup>51</sup> The state should have no right to "decide producers' questions or to exercise direct control over production."<sup>52</sup> In the matter of industry, there should be a division of functions between the state, as the representative of the organized consumers, and the trade unions, representing the organized producers. The legislative power, so far as it relates to industry, should be exercised by two co-equal parliaments, facing each other, one representing the state, the other representing the producers, each being supreme within its sphere. This latter is the solution proposed by the Guild Socialists.<sup>53</sup>

**The Pluralistic Theory Criticized.**—The pluralistic conception necessarily involves a denial of the sovereignty of the state, and those who hold it declare that the theory of sovereignty should be abandoned, that in practice it has broken down, that it is a "superstition" or useless fiction, and no longer corresponds to the facts of modern life,<sup>54</sup> etc.

It will readily be admitted that voluntary groups or associations have come to play a rôle in the local and national life of civilized

(1917), ch. 1; and "Foundations of Sovereignty and Other Essays" (1921), pp. 232, 249, by the same author. <sup>51</sup> Laski, "Grammar," p. 269.

<sup>52</sup> Cole, *op. cit.*, pp. 30, 32.

<sup>53</sup> Cole, "Self-Government in Industry" (1917); Webb, "A Constitution for the Socialist Commonwealth of Great Britain" (1920), especially pp. 110 ff. and 115 ff., where the establishment of two parliaments, one "political," the other "social," is proposed; Hobson, "National Guilds and the State" (1920); Penty, "Old Worlds for New" (1919); Taylor, "The Guild State" (1920); Belloc, "The Servile State" (1920); Russell, "Proposed Roads to Freedom" (1919), pp. 82-94; Carpenter, "Guild Socialism" (1922).

<sup>54</sup> So argue Laski, "Grammar of Politics," p. 271; Cole, "Self-Government in Industry," p. 127; Barker, article cited; Lindsay, article cited, p. 136; Krabbé, "Modern Idea of the State," p. 35; and Duguit, "Droit constitutionnel" (1911), vol. I, pp. 49 ff. and 19 ff. See also the exposition by Coker, "The Attack upon State Sovereignty" in Merriam, Barnes, and others, "Political Theories, Recent Times" (1925), pp. 80 ff., and his article, "The Technique of the Pluralistic State," *Amer. Pol. Sci. Review*, XV, pp. 185 ff.; Ellis, "Guild Socialism and Pluralism," *ibid.*, XVIII, pp. 584 ff.; and Elliot, "Sovereign State or Sovereign Group," *ibid.*, XIX, pp. 475 ff.

peoples such as was formerly unknown, that many of them are performing or endeavoring to perform services of great public value to society, and that consequently they may well be encouraged and in some cases even aided by subventions from the state. Much might also be said in favor of a system of representation which should take them into account. But it is submitted that any theory which seeks to place them on the same level with the state, which maintains that there is no essential difference between them and the state, which suggests that the individual may have two or more allegiances or loyalties, one to the state and one or more to the groups to which he is attached, and that the former is not necessarily superior to the latter : which would throw overboard the principle of the sovereignty of the state and parcel out its powers and functions between the state and a multitude of other associations, cannot stand the test of criticism. It would mean a return, in large measure, to the semi-anarchy of the Middle Ages, when sovereignty was divided among various contending rulers or bodies : the church, the state, the feudal lords, clans, guilds, etc.<sup>57</sup> "The vision of a working-class organization building up for itself an economic state," says an able English writer, "governed by the workers, and for the workers, within the political state, but virtually independent of that state for the regulation of economic life, is a dangerous fantasy."<sup>58</sup> If the theory were put into practice it would, in all probability, lead to innumerable conflicts of jurisdiction ; the authority of the state, confronted as it would be by competing and rival associations, would shrivel up, and its power to maintain order and security would be materially impaired. The very recognition of the autonomy demanded by the "pluralists" for the other associations would only intensify the need of a superior power, such as the state, to protect society against the consequences of the inevitable conflicts between them, as well as to protect their own members against the

<sup>57</sup> Sömz, indeed, who advocate the theory explained above maintain that a return to the medieval guild system is desirable. But as Barker remarks ("Medieval Political Thought," in "Some Great Medieval Thinkers," 1923, p. 28), "We cannot argue from the position of groups in the medieval state to the position of groups in the modern, just because the medieval state was so different from the modern."

<sup>58</sup> Hobson, "Democracy after the War" (1918), p. 181. See also Esmein, *op. cit.* (5th ed., 1939), p. 28, who pronounces the theory to be both "inexact and dangerous."

possible tyranny and oppression of their own governing bodies.<sup>57</sup> One of the most important services which the state renders, in fact, is keeping within proper limits the classes and struggles between competing groups, and performing the rôle of a sort of referee or umpire in adjusting or reconciling their conflicting interests.<sup>58</sup>

**Conclusion.**—While it is possible to conceive a better organization, in some respects, of the state,<sup>59</sup> it is an exaggeration to say that the monistic sovereign state has become "discredited," that experience has demonstrated its inadequacy and inadaptability to the conditions of modern life, and that it should be replaced by a pluralistic type. The burden of proof is upon those who advocate the change and as yet they have not succeeded in discharging the obligation.

### III. THE ENDS OF THE STATE

**Is the State an End or a Means?**—From an examination of the nature of the state we pass naturally to a consideration of its objects, purposes, or ends. The conceptions which have prevailed in different ages and even among different writers in the same epoch in respect to this question have varied, although among those who admit the value and necessity of the state the variation of opinion has not been fundamental. The differences have consisted rather in the varying emphasis which authors have placed upon certain objects which the state was established to promote and the order of their importance.

It has often been said of the ancients, and especially of the Greeks, that in their practice they proceeded on the principle that the state was an end in itself and not merely a means for the achievement of particular ends. In accordance with this conception hardly any realm

<sup>57</sup> Compare in this sense Barker, *op. cit.*, p. 245; Coker in Merriam, Barnes, and others, *op. cit.*, pp. 111 ff.; and Ellis, "The Pluralistic State," *Amer. Pol. Sci. Review*, vol. XIV (1920), pp. 404-405.

<sup>58</sup> Even Figgis admits that "to prevent injustice between them [groups] and to secure their rights, a strong power above them is needed," and that "it is largely to regulate such groups and to insure that they do not overstep the bounds of justice, that the coercive force of the state exists"; *op. cit.*, p. 90.

<sup>59</sup> Sympathetic critics like Coker, Follett, and Ellis have pointed out that the teachings of the pluralists have not been without a certain value, particularly by emphasizing the increasing importance of social groupings, and the desirability of taking them more into account in the construction of a system of representative government.

of human action was considered to be sacred from the intrusion of the state. The notion that there could be individual interests distinct from the collective interests of society hardly existed at all.<sup>60</sup> The life of the individual was regulated and his activities prescribed as if he were made for the state rather than it for him. The political philosophy of modern Germany has been criticized for being based on somewhat the same principle. In general, however, modern political science emphasizes the principle that the state is merely an institution or means by which certain objects are accomplished, and not an end in itself.<sup>61</sup>

**Ends of the State Distinguished.**—In considering the ends of the state we may distinguish between its general or fundamental ends and its particular ends. We may also distinguish between the ultimate ends and the immediate or proximate ends.<sup>62</sup> The German writer Holtzendorff, in his "Principien der Politik," distinguished between the actual ends of the state and the ideal ends.<sup>63</sup> The actual ends, he said, are : first, the development of the national power ; second, the

<sup>60</sup> Compare Laboulaye, "The Modern State", p. 107.

<sup>61</sup> Some modern political writers, however, regard the state as an end in itself. See, e.g., Ritchie ("Principles of State Interference," p. 102), who remarks that since the best life can be realized only in the state, the state is not a mere means but an end in itself. Substantially the same opinion is expressed by Villey in his "Rôle de l'état," pp. 8, 9, and by Hegel in his "Philosophie des Rechts." Willoughby ("Nature of the State," p. 317) remarks that whether the state is an end or a means depends on the viewpoint. From the purely individualistic viewpoint it is only a means, an instrumentality, or an expedient through which the highest possible development of humanity is obtained. But if the state is considered as an institution distinct and apart from the citizens who compose it, it is, of course, he says, an end in itself.

Bluntschli thought both the ancient and the modern theories contained elements of truth and error. The state, he said, may be an end or a means, depending on the point of view from which it is regarded, just as a picture may be ; that is, a means by which the artist gains his livelihood, and at the same time the realization of his highest aim. In the same way the state is a means by which the individuals who compose it realize certain advantages and at the same time it is an end in itself. "Theory of the State," pp. 305-307.

<sup>62</sup> As to the distinction between the ideal and the real ends of the state, see Holtzendorff, "Principien der Politik," ch. 7, and Bluntschli, *op. cit.*, bk. V, ch. 2 ; on the distinction between the ends of the state in general and those of a particular state, see Willoughby, *op. cit.*, p. 309 ; between the specific and general purposes of the state, see Von Mohl, "Encyklopädie der Staatswissenschaften," p. 77 ; between the primary, ultimate, and secondary ends, see Burgess, "Political Science and Constitutional Law," vol. I, p. 85.

<sup>63</sup> Chs. 7-8.

maintenance of justice and law ; and, third, the promotion of the social progress and civilization of the people. In short, national power, justice, and the civilization of mankind, stated in the order of their importance, according to Holtzendorff are the actual ends of the state. The first mentioned is the primary end ; the last, the ultimate end.<sup>64</sup>

Bluntschli followed Holtzendorff in rejecting as too narrow and fruitless the "justice" theory (*Theorie des Rechtszweckes*), which considers the end of the state to be merely the maintenance of justice among men ; and similarly the "morality" theory (*Theorie des Sittlichkeitsszweckes*), propounded and advocated by Hegel, which regards the mission of the state to be the realization of the moral law. Bluntschli, like Holtzendorff, attached great importance to the "general welfare" theory (*Theorie des Wohlfahrtszweckes*), though he pointed out the difficulty arising from the lack of an exact test for determining what constitutes the general welfare. He asserted that it had been the cloak for covering many political sins and the justification for many arbitrary and despotic acts of the state.<sup>65</sup> To say that the primary and fundamental purpose of the state is the furthering of the common welfare does not bring us very near to the solution, since it does not tell us what is the common welfare. It is very much like saying that the duty of the citizen is to keep to the path of virtue, without telling him what virtue is or where the way lies.

Von Mohl, another famous German writer on political science, conceived the end of the state to be the promotion of the life purposes of the people (*die Förderung der Lebenszwecke des Volkes*).<sup>66</sup> Burgess, an American writer, advances the view that the purposes or ends of the state may be classified as *primary*, *secondary*, and *ultimate*. The ultimate end, which he considers first, is (following Holtzendorff and Bluntschli) the perfection of humanity, the civilization of the world, and (following Hegel) the establishment on earth of the reign of virtue and morality. The secondary end is the perfection of the principle of nationality in the state and the development of the national genius and the national life. The primary end is the establishment of a system of government and liberty. To state them in their historical order, they are, he says : first, the organization of government and

<sup>64</sup> *Ibid.*, ch. 11, "Die Harmonie der Staatszwecken."

<sup>65</sup> "Theory of the State," bk. V, ch. 4.

<sup>66</sup> "Encyklopädie der Staatswissenschaften," pp. 71, 76.

liberty, so as to give the highest possible power to the government consistent with the highest possible freedom in the individual; to the end, secondly, that the national genius of the different states may be developed and perfected and made objective in customs, laws, and institutions; by which, finally, the world's civilization may be surveyed upon all sides, mapped out, traversed, made known, and realized.<sup>67</sup> But here again we have what seems to be a confusion of ends with means. It is difficult to see, for example, why the establishment of government should be considered as an end to be realized rather than the means through which ends are sought.

Many other attempts have been made by political writers to formulate concisely the doctrine of the ends of the state. Locke, for example, stated that the end of government is "the good of mankind"<sup>68</sup>—"the noblest and briefest" statement of the purpose of government, said Huxley, that was ever formulated.<sup>69</sup> But the good of mankind is something which is not absolutely fixed for all men, regardless of conditions and circumstances, and there is far from being any common agreement concerning its constituent elements. Professor Ritchie, in his "Principles of State Interference," conceives the end of the state to be simply the realization of the best life by the individual. John Stuart Mill declared that the "proper end of government is to reduce the wretched wastes due to the neutralization of the best efforts and talents of men to the smallest possible amount by taking such measures as shall cause the energies now spent by mankind in injuring one another or in protecting themselves against injury, to be turned to the legitimate employment of the human faculties, that of compelling the power of nature to be more and more sub-servient to the physical and moral good."<sup>70</sup>

**Conclusion.**—The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among

<sup>67</sup> "Political Science and Constitutional Law," vol. I, p. 89.

<sup>68</sup> "Two Treatises of Government," sec. 223.

<sup>69</sup> "Critiques and Addresses," p. 23.

<sup>70</sup> "Political Economy," vol. II, p. 603. Spinoza conceived the chief aim of the state to be the maintenance of liberty, "Theologico-Political Treatise" (Tr. by Elwes), p. 259. Professor Giddings conceives its fundamental object to be "the maintenance of conditions under which all subjects may live, as Aristotle said, 'a perfect and self-sufficing life'"; "Descriptive and Historical Sociology," p. 519.

the people who compose it. No state which fails to achieve these ends in a reasonable degree can justify its existence. Secondly, the state must look beyond the needs of the individual as such to the larger collective needs of society—the welfare of the group. It must care for the common interests and promote the national progress by doing for society the things which the common interests require, but which cannot be done at all, or done efficiently, by individuals acting singly or through voluntary associations. This is what Holtzendorff and Bluntschli must have meant when they said that one of the ends of the state is the development of the national capacities and the perfection of the national life. This may be called the secondary end of the state. Finally, the promotion of the civilization of mankind at large may be considered the ultimate and highest end of the state. This is the mission-of-civilization theory (*Theorie des Kulturzweckes des Staates*) of the Germans, which was powerfully defended and advocated by Holtzendorff, Stein, Wagner, Bluntschli, and others. Thus the state has a triple end : first, its mission is the advancement of the good of the individual; then it should seek to promote the collective interests of individuals in their associated capacity; and finally it should aim at the furthering of the civilization and progress of the world.<sup>71</sup>

<sup>71</sup> The proper functions of the state are discussed in more detail in Chapter XVII.

## CHAPTER V

### CONSTITUENT ELEMENTS AND ATTRIBUTES OF THE STATE

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#### I. POPULATION

**Necessity of People.**—The state, as is pointed out in Chapter IV, may be viewed as both a concrete thing and an abstract idea. Envisaged *in concreto* it is a human group or association; viewed *in abstracto* it is a corporation possessing a juristic personality. The concrete state composed of land and people is not the same thing as the state considered as an abstract idea, any more than a thing is

identical with its qualities : for example, a railroad and the corporation which owns and directs its operation. The state is composed, therefore, of both physical and metaphysical or spiritual elements. These elements are : (1) a group of human beings ; (2) a territory upon which they permanently reside ; (3) internal sovereignty and independence of foreign control ; and (4) a political organization or agency through which the collective will of the population is expressed and enforced.<sup>1</sup> In addition, the state possesses certain attributes or characteristics which can hardly be regarded as constituent elements. Students of political science should avoid, however, confusing the state with its elements or with certain of them. The state is neither the people, nor the land upon which they reside, nor the government which formulates and executes the will of the state. Confusion of the state and the government, especially, is very common and it has been a frequent cause of misunderstanding and error.<sup>2</sup> The physical element of population is manifestly an absolute necessity to the existence of a state. It is impossible to conceive of a state without people. Without them there could be no functionaries to govern and no subjects to be governed.

#### The People Viewed as Citizens and Subjects of the State.—

The population of the state must be envisaged from a double point of view : first, as citizens, that is, as members of the state and entitled to the privileges which flow therefrom ; and, second, as the subjects of the power and action of the state, that is, as the persons to whom its commands and injunctions are addressed.<sup>3</sup> Rousseau viewed the members of the state in a double capacity, that is, as "active" citizens participating in the formulation of the general will and, at the same time, as "subjects," bound by the laws of the state.<sup>4</sup>

<sup>1</sup> M. Duguit ("Droit constitutionnel," 1911, vol. I, p. 48) enumerates six other elements of the state. Upon examination, however, they will be seen to be less constituent elements than characteristics or conditions.

<sup>2</sup> Compare Carré de Malberg, *op. cit.* (1920), vol. I, p. 8. Seidler ("Das juristische Kriterium des Staates," p. 59) identifies the state with its territory when he says "the state is the territory itself envisaged under the relation of its extent." Compare in the same sense Fricker, "Vom Staatsgebiete," p. 27.

<sup>3</sup> Compare in this sense Jellinek, "Recht des modernen Staates," French translation, vol. II, p. 34.

<sup>4</sup> "Social Contract," bk. I, ch. 6. Compare also Waitz, "Grundzüge des Politik," pp. 21-24.

In a certain sense the possession of the quality of citizen is not essential to membership in the state, since as a matter of fact there are to be found in every state certain classes of persons who, while not citizens, are accorded the protection of the state and enjoy its benefits. The possession of citizenship, however, is the normal condition of full membership, and in practice most states require it as a condition to the exercise of political privileges and even to the enjoyment of full civil rights.<sup>5</sup>

**Number of People Necessary to Form a State.**—How numerous must be the population in order that it may be properly regarded as a state, when the other essential elements are present? Some early writers undertook to lay down certain general principles which should determine the number of people necessary to the existence of a state, and some even went to the length of suggesting the minimum and maximum number of inhabitants. Aristotle was clearly of the opinion that there ought to be a limit, and he laid down the general principle that the number should be neither too small nor too large; it should, he said, be large enough to be self-sufficing and small enough to be well governed.<sup>6</sup> Rousseau, likewise, considered the matter of numbers to be important. He asserted that a "political body" may be measured in two ways: by the extent of its territory and by the number of its people, and that there should be a "suitable relation" between the two.

The territory, he said, should be sufficient in extent for the maintenance of the population, and there should be as many inhabitants as the land could sustain. Apparently he also meant to assert that the population should not be in excess of the number which the land was capable of supporting. He admitted, however, that it was impossible to express numerically a fixed ratio between the extent of territory and the number of inhabitants which it should contain, owing to the differences of fertility of soil and the nature of the climate.<sup>7</sup> Manifestly, it would be futile to attempt to lay down any precise rule as to the maximum or minimum number of inhabitants of which a state

<sup>5</sup> Compare Bornhak, "Allgemeine Staatslehre," p. 11.

<sup>6</sup> "Politics," bk. VII, 4 (Jowett's ed., p. 267); "Laws," V, 737. Plato ventured to suggest that the population should be fixed at 5040 inhabitants.

<sup>7</sup> "Social Contract," bk. II, ch. 10. He thought, however, that 10,000 would be an ideal number.

should be composed. In fact, the populations of existing states range all the way from a few thousand, as in Monaco and San Marino, to hundreds of millions, as in Russia and China. About all that can be said is that the population must be sufficient in number to maintain a state organization, and that it ought not to be greater than the territorial area and resources of the state are capable of supporting. Duguit maintains, what is perfectly obvious, that the population must be sufficient to make possible a differentiation between those who govern and those who are governed;<sup>8</sup> while Hauriou asserts what is equally obvious, that it must be sufficient to make possible a distinction between public and private affairs.<sup>9</sup>

## II. TERRITORY

**Necessity of Territory.**—The second constituent physical element in the make-up of the state is the land or territory upon which the people who constitute the state permanently reside and within whose limits its power and activities are exercised. "As the state has its personal basis in the people," said Bluntschli, "so it has its material basis in the land. The people do not become a state until they have acquired a territory."<sup>10</sup> In this respect the state differs from other human associations or organizations. The latter exist without regard to relations of place; their membership and activities may, in fact, embrace the entire world,<sup>11</sup> whereas the state is a territorial association which embraces the population only of a particular and limited area. Moreover, there is no limit to the number of voluntary associations which may exist in a given territory, whereas only one state can exist on the same territory. The co-existence of two or more states on the same territory would, as Jellinek remarks, produce a continual state of war by reason of the conflicts of interests and of jurisdiction.<sup>12</sup>

<sup>8</sup> *Op. cit.*, p. 68.

<sup>9</sup> "Droit administratif," p. 7. Compare also Schulze, "Deutsches Staatsrecht" (vol. I, p. 16), and Bornhak, "Allgemeine Staatslehre" (p. 16), both of whom maintain that the population must exceed that of a single family; that is, it must embrace at least a "circle" of families. <sup>10</sup> "Theory of the State," p. 231.

<sup>11</sup> "The Handbook of International Organizations," issued by the League of Nations in 1921, gives the names of several hundred international associations, bureaus, committees, etc. <sup>12</sup> *Op. cit.*, p. 19.

To this principle, however, there are several apparent exceptions. The first is afforded by the situation known as *condominium* (a better term would be *co-imperium*), where two or more states exercise over the same territory a common sovereignty or jurisdiction. Examples are afforded by the Austrian-Prussian *condominium* over Schleswig-Holstein (1864-1868); that of Austria-Hungary over Bosnia and Herzegovina (1878-1908); the Anglo-Egyptian *condominium* over the Sudan; and that of Great Britain and France over the New Hebrides Islands, the last two being still in existence.<sup>13</sup> Relationships of this kind have usually been established where there was an irreconcilable dispute as to which of the two states should have the territory. Generally they represent a provisional arrangement and have not endured permanently.

In the second place, in the case of federal unions, there is a co-existence on the same territory of the federation and the component member-states. The latter, however, are not generally regarded as states, at least not in the full sense of the term; in any case, they are not sovereign states and therefore do not have the power to determine their own competence. Consequently the danger of conflict is reduced to a minimum.

In the third place, as a result of the principle of extraterritorial jurisdiction under which foreign diplomatic representatives remain subject to the law of their own state and under which in a few countries (China, for example) foreigners generally are permitted to be tried before the ministers, consuls, or courts of their own country, we have an example of two or more states exercising jurisdiction in the same territory.

Finally, in the fourth place, in consequence of military occupation by an enemy, a territory may be legally subject to the sovereignty of one state and at the same time temporarily subject, in fact, to the authority of another state. But since it is the military occupant alone who actually gives commands in the territory, while the legal sovereign is for the time displaced, it is really not a case of the actual exercise of jurisdiction by two states within the same territory. Recent notable examples of such a situation were afforded during the World

<sup>13</sup> As to these and other examples of *condominium* see Oppenheim, "International Law" (3d ed. 1920), vol. I, p. 308, and Fauchille, "Droit international public" (1921), vol. I, pt. I, p. 694.

War by the occupation of the territory of Belgium by Germany, and of Serbia and Montenegro by the allies of Germany. The government of Belgium, with the authorization of the French government, transported itself to France, installed itself at Havre, and there continued to exercise such of its powers as it was capable of exercising. Was this an example of a state without a territory? In legal theory the Belgian state continued to exist, although its government was in exile and the territory occupied by an enemy. Could it be said that Havre, and indeed all the Belgian camps and other places in England and France where the Belgian government functioned and exercised jurisdiction, constituted a part of the "territory" of Belgium, a sort of "ideal" territory so to speak? A Belgian military court sitting at Havre rendered a decision on July 21, 1918, adopting this view,<sup>14</sup> but it was overruled by a decision of the Belgian Court of Cassation (Feb. 1, 1923), which held that the "territory" of Belgium must be understood in its ordinary sense and did not embrace all places everywhere, in which the sovereign rights of Belgium extended; for example, the Belgian military camps which had been established in England and France, with the consent of their governments.<sup>15</sup>

The decision of the military court was contrary to the principle of *exclusivité* according to which a given territory can constitute the domain of but a single state. The notion that any place in which the authority of the state may be exercised, even if situated in a foreign country, constitutes a part of the territory of the state, if admitted would lead to the impossible conclusion that the entire world constitutes the territory of each state, since there is hardly a part of it in which citizens of foreign states are not to be found and over whom their own state exercises the right of protection.<sup>16</sup>

**Necessity of Territory Denied.**—The early writers on political science do not appear to have expressly affirmed the necessity of territory as an element of the state, and it has been pointed out that

<sup>14</sup> Text of the decision in Travers, "Le droit pénal international" (1920), vol. I, pp. 240 ff.

<sup>15</sup> Text of the decision in Clunet's *Journal de droit international*, vol. LI, p. 249.

<sup>16</sup> Compare Fauchille, "Droit international public" (1925), vol. I, pt. II, p. 4. But compare the remarkable statement of President Coolidge in his address of April 25, 1927 (*New York Times*, April 27) that "the person and property of a citizen are a part of the general domain of the nation even when abroad."

none of the definitions of the state prior to the nineteenth century mentioned territory as an essential element.<sup>17</sup> To-day, however, nearly all writers on political science and international law consider territory to be essential, and their definitions of the state expressly embody the idea. There are, however, a few exceptions. Thus, W. E. Hall, one of the highest authorities on international law, said, "abstractly, there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community, by definite rules of conduct toward other communities," although he admits that "the circumstances of modern civilization which associate land with sovereignty make the possession of a fixed territory a practical necessity."<sup>18</sup> M. Duguit goes still further and asserts emphatically that "territory is not an indispensable element in the formation of a state." The differentiation between the governed and those who govern, according to him, is what makes a state, and this differentiation can exist in a society which is not fixed on a determinate territory. "The differentiation," he says, "has its limits in a certain territory; territory furnishes the material limit of the effective action of government, and only in this sense does it play a rôle in the constitution of modern states." But he, too, admits that modern civilized societies are in fact fixed on definite territories.<sup>19</sup> Practically, it is hard to see how a nomadic or migratory people unattached to a definite portion of land can constitute a state, at least according to the modern conception of the state. The Jews, before their settlement in Palestine and after their dispersion, the German tribes during their wanderings after the break-up

<sup>17</sup> Jellinek, *op. cit.*, p. 19. Jellinek remarks that Klüber in 1817 was the first writer to define the state as a society of citizens "having a determinate *territory*."

<sup>18</sup> "International Law" (3d ed.), p. 20. Compare also Holland (in the definition of the state quoted in Chapter III above).

<sup>19</sup> "Droit constitutionnel" (1911), vol. I, p. 94. In a later work, "Souveraineté et liberté" (1922), p. 27, he declares that "incontestably the first element of the natural formation is territory." As to denials of other writers see Rehm, "Staatslehre," p. 36. Czechoslovakia, after the recognition of the belligerency of the Czecho-Slovak people by several powers in 1918, has been cited as an example of a state without territory, since the Czecho-Slovak territory was occupied by the enemy and so far as there was any organization it consisted of self-constituted committees or juntas in other countries. It would, however, be stretching the conception of the state beyond reason to consider such an organization as a state. It constituted without doubt the nucleus of a state but it did not become a state until a government was established in the Czecho-Slovak territory.

of the Roman Empire, the Boers of South Africa during their "trek" northward, may have had leaders and been subject to discipline and control, but they could hardly be said to have constituted a state. A people under such conditions may be a state in the making, but they do not become a state until their migration has ceased and they have established themselves permanently on a definite portion of territory. The state, as the etymological meaning of the word implies, it associated with a fixed abode.

It may be remarked in this connection that the territory of a state may be compact and contiguous in character or it may be divided and disconnected geographically, as in the case of states like Great Britain, which consists in part of colonies separated from the parent state by seas and oceans. The territory of the German state to-day is divided into two parts, separated from each other by the Polish "corridor." A state may also be in the anomalous position of an "enclave" (*territorium clausum*), that is, surrounded entirely by the territory of another state. Such is the situation of the petty republic of San Marino, which is entirely surrounded by Italian territory. Likewise parts of a state may be enclaves. Examples were numerous two centuries ago and they are not entirely lacking to-day.

**Territory as Jurisdictional Area.**—The juridical importance of territory reveals itself, at Jellinek remarked, in a double aspect: first, in a negative manner by the fact that every other power than that of the state itself is excluded from exercising dominion in the territory without the authorization of the state; and second, in a positive aspect, by the fact that all persons and things within the territory are, in the absence of the state's consent, subject to its own jurisdiction.<sup>20</sup> As has already been said, the one element which distinguishes the state from all other groups or associations of men is that the state possesses sovereignty while the others do not, and the modern conception of sovereignty is territorial and not personal. That is, the exercise of sovereignty is associated with territory and is confined to the territorial limits of the state exercising it, within which territory are included also, by a fiction of the law, ships possessing the nationality of the state even when actually outside those limits. It is quite true that in many countries, particularly those of continental

<sup>20</sup> *Op. cit.*, p. 17.

Europe, where the theory of personal jurisdiction prevails, the jurisdiction of the state is asserted over its citizens while abroad and they will be punished for crimes committed outside the territorial limits of the state, in case they return thereto and are apprehended. In this sense it might be said that the jurisdiction of every state in which this theory prevails extends over the entire globe. But it can be actually exercised only within the territorial limits of the state to which such citizens belong. They cannot be pursued, arrested, or punished outside those limits, nor can the laws of the state be enforced as regards other matters beyond the territorial frontier.<sup>21</sup>

Territory is thus the indispensable *spatial base* upon which the state exercises its power of command and restraint. Unlike the population, however, the territory can hardly be considered, as some German writers have asserted,<sup>22</sup> the *object* of the sovereignty of the state, and consequently subject to what the French call *un droit réel d'ordre politique* distinct from the right of government exercised over persons. This doctrine was very properly denied by Jellinek, who asserted that the state can exercise *imperium*, the power of government, over territory only through the intermediary of the individuals who live on it. The state can command only men, not territory. A thing, territory for example, can be subject to *imperium* only in so far as the state commands men to act on this thing.<sup>23</sup> It is equally attacked by Duguit, who asserts that sovereignty is the power to command and territory cannot be commanded. "To speak of sovereignty or political power over a territory," he says, "is to employ a formula which contains a contradiction in itself."<sup>24</sup>

**The Patrimonial Theory.**—It was one of the characteristics of the feudal theory of the state that sovereignty and ownership of the land over which it was exercised were identified. According to that theory, whoever had the right of government had the right of

<sup>21</sup> Compare, as to this, Carré de Malberg, "Théorie générale de l'état" (1920), vol. I, p. 3. <sup>22</sup> For example, Gerber and Laband. <sup>23</sup> *Op. cit.*, p. 24.

<sup>24</sup> *Op. cit.*, p. 97. Compare to the same effect Carré de Malberg (*op. cit.*, p. 4), who says it is better not to consider territory as an *object* of state power but rather the area within which it is exercised. It is rather a condition and a quality of this power than the *object* against which it is directed. See further on the subject Meyer, "Lehrbuch des deutschen Staatsrechts" (6th ed.), p. 212, and the authors there cited.

ownership of the land and, indeed, of the people who occupied it. *Imperium*, in short, involved *dominium*. This theory prevailed even in the sixteenth, seventeenth, and eighteenth centuries, and was acted upon in practice. It was approved by Grotius, who said, "It may therefore happen that a king has authority over a people as a *proprietary* right, so that he can even alienate that territory to another."<sup>25</sup> Louis XIV may never have pronounced the words attributed to him : "I am the state," but they expressed, nevertheless, the dominant conception of his day.<sup>26</sup> As a result of the theory, territories with their inhabitants were sometimes sold, exchanged, acquired by marriage, or bequeathed by kings as if they were nothing more than chattels according to private law.<sup>27</sup> The theory involved a confusion of a concept of public law (the *imperium* of the Roman law) with that of private law (*dominium*), although the Romans did not identify them. Thus Seneca was often quoted as saying : "To kings belong power (*potestas*), to individuals, property (*proprietas*)."<sup>28</sup> The theory received its death blow at the hands of the French Revolutionists, who proclaimed the doctrine of the sovereignty of the people, a doctrine with which the patrimonial conception of the state was irreconcilable.<sup>29</sup>

<sup>25</sup> To the same effect compare Bodin, "Six livres de la république" (1576); Loyseau, "Traité des seignories" (1640); Lebret, "De la souveraineté" (1642); and Dornat, "Le droit public" (1731).

<sup>26</sup> Duguit, *op. cit.*, vol. I, p. 47. Louis XIV, in fact, claimed the entire territory of France as royal domain of which he was the supreme suzerain with full power to dispose of all land, both secular and ecclesiastical. "Kings," he said, "are absolute lords (*seigneurs*) and have naturally the full and free disposition of all lands (*bien*s) which are possessed as well by the church as by the laity for use at all times for the general needs of their state." *Œuvres*, II, 121.

<sup>27</sup> Thackeray in his "Four Georges" relates that the Duke of Hanover sold to the seigniory of Venice 5700 of his subjects, of whom only 1400 ever saw their homes again. The proceeds of the sale were devoted to the satisfaction of the Duke's sensual pleasures. Thackeray concluded his denunciation of this detestable act by the remark that in the first half of the eighteenth century this was "going on over all Europe."

<sup>28</sup> In recognition of the new conception, the French changed the title of their kings from *Roi de France* to *Roi des Français*. The latter title implied that the king exercised the power of government over the French people, and negatived the idea implied in the former title that he had the right of ownership of the land and people. While Louis XVIII and Charles X insisted on taking the old title they did not of course maintain the patrimonial theory with which it was associated. See Bluntschli, "Theory of the State," p. 245, and Esmein, "Droit constitutionnel" (1909), p. 2. As to the patrimonial conception, see also Jellinek, "Allgemeine Staatslehre" (1905), p. 157.

Nevertheless the old idea was not without influence upon the Vienna Congress (1815), whose disposition of peoples and territories was in line with the notion that they belonged to the monarchs who governed them. To-day, however, the patrimonial conception, like the divine right of kings, belongs to the dead and discarded political theories of the past.<sup>29</sup> The state has over the territory only the right of government, the right which the Roumans called *imperium*, and not the right of ownership (*dominium*),<sup>30</sup> exception, of course, being made in the case of land which constitutes the public domain strictly speaking. Over such land the state has both the right of government and of ownership.

**Restrictions Resulting from International Servitudes.**—Although as stated above, the normal condition of a state is that it has absolute and exclusive jurisdiction over all persons and things within its territorial limits, nevertheless all states through considerations of comity and mutual convenience have waived the exercise of their jurisdiction over foreign sovereigns, diplomatic representatives, and foreign public vessels which may happen to be temporarily within their territory or ports.<sup>31</sup> The supremacy of the state over its territory may be further restricted by the existence of what are known as international servitudes to which it has become subject. Such a restriction exists where a foreign state has acquired by treaty, custom, or prescription, a permanent right to use the territory, ports, or waters of another state for certain purposes; for example, the exercise of the right of fishery, the construction of telegraph lines, the laying of cables in territorial waters, the construction of railways or railway tunnels, the right of passage for troops, the erection of customs houses, the maintenance of post offices, the acquisition of coaling stations, the running of railway trains across the territory, etc. History affords numerous examples of such servitudes.

<sup>29</sup> In some of the native states of India, however, the patrimonial conception still prevails, the land, in legal theory at least, being regarded as the property of the ruler.

<sup>30</sup> It should of course be remarked, however, that the state possesses over privately owned land the so-called right of eminent domain, that is, the right to expropriate it for public use when needed by the state.

<sup>31</sup> See the classic statement of Chief Justice Marshall in the case of the *Schonner Exchange v. McFadden* (7 Cranch, 116).

The great majority of writers on international law approve the doctrine of international servitudes, although a few still reject it.<sup>32</sup> In view of the practice it would seem futile to deny it. It is true that the tribunal of arbitration in the *North Atlantic Fisheries Case* (1910), while not absolutely condemning the doctrine, declared it to be "little suited to the principle of sovereignty which prevails in states under a system of constitutional government, and to the present international relations of states." In this case, the government of the United States had contended that the privilege of fishing in certain waters of British North America and of curing and drying fish on the coasts thereof, granted by treaty (1818), constituted an international servitude the effect of which, it further contended, was to impair the sovereignty of Great Britain to the extent of depriving the British and local governments of the right to regulate the exercise of the privilege of fishery thus granted. The tribunal in its decision interpreted a servitude in international law as involving the express grant by one state (the servient state) of a "sovereign right" to another state (the dominant state) to use the territory of the former for certain purposes; it asserted that the doctrine of servitudes, in the sense which the United States sought to attribute to it in this case, originated in "the peculiar and now obsolete conditions prevailing in the Holy Roman Empire, of which the *domini terrae* were not fully sovereign" and, as stated above, declared that it was not in harmony with the modern conception of territorial sovereignty. The tribunal did not deny the existence of international servitudes or even condemn the doctrine as has been erroneously stated by some authors. What it did deny was that the grant by Great Britain of the privilege of fishery on certain of its coasts and in certain of its waters was intended to be the grant of a "sovereign right" and what it affirmed was that a servitude in the sense of involving a diminution of the sovereignty of the servient state was no longer admissible.<sup>33</sup>

<sup>32</sup> For example, among others, Bulmerineq, Garcis, Jellinek, Von Listz, Nys, and De Louer.

<sup>33</sup> Text of the decision in Scott, "The Hague Court Reports" (1916), pp. 146 ff. See especially pp. 150-161. See also Lansing, "The North Atlantic Coast Fisheries Case," xi, *Columbia Law Review* (1911), especially pp. 5 ff., where an extensive list of references to the literature will be found. Oppenheim (*op. cit.*, I, 369), however, denies that a servitude involves the concession of a sovereign right, although he admits that the sovereignty of a state which grants a servitude to another state is "indeed thereby somewhat restricted." M. Basdevant, on the con-

The commission of jurists appointed by the Council of the League of Nations (1920) to report on the Aland Islands controversy, likewise rejected the doctrine of international servitudes in so far as the doctrine implies restrictions upon the sovereignty of the servient state and declared that the existence of servitudes in this sense was not "generally admitted."<sup>34</sup>

While there is an increasing preponderance of opinion in favor of the view that the doctrine of servitudes in the sense of implying the surrender of sovereign rights by the servient state over its territory, for the benefit of a foreign state, must be condemned as incompatible with the modern conception of territorial sovereignty, servitudes nevertheless continue to exist, and there can be no denial of the fact that they do involve restrictions upon the jurisdiction of the state which grants them, whether we call it sovereignty or something else. Recent examples of what, in effect at least, amounts to servitudes were the restrictions placed upon Germany and Austria by the treaties of peace in 1919 in favor of certain other states.<sup>35</sup> Thus Poland was given the right of access to the free city of Danzig across German territory; France was given the right to erect certain works on the right bank of the Rhine, including also the right of passage thereover; Czechoslovakia was allowed the use of certain free zones for customs purposes in the ports of Hamburg and Stettin, for a period of 99 years; also, the right to run trains over Austrian railroads and to have trunk telegraph and telephone lines for its exclusive use across Austrian territory, and all countries at peace with Germany were given the right to use the Kiel

Canal, thinks that the exercise of sovereign rights by the "dominant" state is essential to the notion of a servitude. The right of fishery, he says, cannot be in the nature of a servitude unless the beneficiary state has the right to regulate, itself, the exercise of the right of fishing. *Rev. gén. de droit int. pub.* (1912), p. 520.

<sup>34</sup> Text of their report in *Journal officiel de la société des nations, Suppl. Spécial* No. 3, Oct., 1920. See especially pp. 17 ff. See also the comments of M. Fernand de Visscher, "La question des îles d'Aaland," *Rev. de droit int. et de l'ég. comparée*, 1921, especially pp. 249 ff. In the case of the *Wimbledon* decided by the Permanent Court of International Justice in 1923, the dissenting Judge, Professor Schücking, maintained that Art. 380 of the Treaty of Versailles, which opens the Kiel Canal to all nations at peace with Germany, subjected the canal to an international servitude. The Court did not feel obliged, however, to express an opinion as to whether it was such in the sense of imposing a restriction upon the sovereignty of Germany.

<sup>35</sup> See especially articles 65, 66, 98, and 358 of the treaty of Versailles and articles 322-324 and 327 of the Austrian treaty of peace.

Canal on an equal footing with Germans. On the other hand, Germany was given the right of communication by railway with the non-contiguous parts of her territory in the east, across Polish territory. These and other like dispositions, whether they may be technically regarded as servitudes or not, necessarily involve restrictions upon the territorial supremacy of the states to which they apply.<sup>36</sup>

**Theory of Territory as a Subjective Element of the State.—**

When we speak of territory as a constituent element of the state, we ordinarily have in mind the state in its concrete physical sense. Some German writers, however, who attribute to the state a juridical personality, go to the length of maintaining that territory is even a constituent element of that personality. This subtle doctrine, known as the theory of territory as a subjective element of the state, is maintained and discussed at great length by Jellinek,<sup>36a</sup> but it is vigorously attacked by Duguit, who not only denies that the state has such a personality, but also maintains that even admitting that it has, the theory which regards territory as one of its elements leads to consequences which are absolutely unacceptable and which are contrary to the facts of international practice to-day, although he admits that it was the theory of the founders of modern French public law. One of the corollaries of the theory, he says, is the indivisibility and inalienability of the national territory, a doctrine which was affirmed by the French Revolutionists in their constitution of 1791 and in several later constitutions. If territory is an element of the state-person, Duguit adds, it cannot be divided and ceded away without the extinction of the personality. But, in fact, a portion of French territory was alienated in 1871, and territory belonging to other states has frequently been alienated. The theory cannot therefore be reconciled with these undoubted historical facts.<sup>37</sup>

While Duguit goes too far in arguing that the state does not possess

<sup>36</sup> On the subject of international servitudes in general, see Oppenheim, *op. cit.* (3d ed.), vol. I, pp. 364-372, and Fauchille, *op. cit.*, vol. I, pt. I (1920), pp. 676-684. See also the excellent articles of Basdevant and de Vissecher cited above, an article by Staël-Holstein entitled "La doctrine des servitudes internationales en Scandinavie," *Rev. de droit int. et de lég. comparée* (1922), pp. 424 ff., a valuable article by McNair, *Brit. Year Book of International Law* (1925), pp. 111 ff., and the article by Lansing referred to above.

<sup>36a</sup> "Allgemeine Staatslehre" (2d ed., 1905), pp. 395 ff.

<sup>37</sup> *Op. cit.*, vol. I, pp. 94-96.

a juridical personality, he is clearly correct in his view that territory cannot be properly regarded as a constituent element of the state's personality. It would be as reasonable to maintain that a bank is one of the constituent elements of the corporate body which owns it and directs its affairs. Another distinguished French jurist, M. Carré de Malberg, however, appears to support the theory of Jellinek. "Territory," he says, "is not an object which is situated outside the juridical state-person and over which this person would possess a power more or less comparable to rights which may belong to a private person over the property dependent upon his patrimony; but it is a constituent element of the state, that is to say, an element of its *being* (*être*) and not of its *having* (*avoir*), an element, in consequence, even of its personality, and in this sense it appears as a component and integral part of the state-person, which, without it, would be inconceivable."<sup>38</sup>

**What is Included in the Notion of "Territory": (1) Subsoil and Marginal Sea.**—When we speak of the *territory* of a state, it is to be understood as comprehending not merely the land domain over which the jurisdiction of the state extends, but also the rivers and lakes therein, a certain area of the sea which abuts upon its coast, in case there is one, and the air space above it. Thus the domain of the state is, or may be, terrestrial, fluvial, maritime, and aerial.<sup>39</sup> The terrestrial domain includes not only the surface of the land but also the subsoil extending downward to an indefinite depth. The power of the state over the subsoil assumes an importance for the construction of subterranean telegraph or telephone lines and railway tunnels and for the exploitation of mineral resources underneath the earth's surface.<sup>40</sup> As to the extent of the area of the sea—the "territorial" or "marginal" sea, as it is usually called—which is included within the territorial jurisdiction of the state, there is a difference of opinion and it has been

<sup>38</sup> "Théorie générale de l'état," vol. I, p. 4, n. 1. Jellinek, however, endeavors to reconcile the theory with the historical facts by arguing that it is not *territory* which was ceded in the cases mentioned, but rather the state's *imperium* over the inhabitants of the territory. See the observations of Duguit, *op. cit.*, p. 96, and Carré de Malberg, *op. cit.*, p. 5. Jellinek's reasoning appears to be supported by Grotius, who said, "when a people is transferred from one sovereign to another, it is not the persons, but the right of governing them, which is transferred." Coker, "Readings in Political Philosophy," p. 273.

<sup>39</sup> Fauchille, "Droit international public" (1925), vol. I, pt. II, p. 3. Fauchille also adds a "polar" and a "glacial" domain.

<sup>40</sup> Fauchille, *op. cit.*, p. 99, and the authorities there cited.

a subject of prolific discussion.<sup>11</sup> The need of agreement on the subject has been recognized by the League of Nations committee of jurists on the codification of international law, which in 1925 placed the subject on its list of questions concerning which there is urgent need of international agreement.<sup>12</sup> The generally admitted rule is that the area of the territorial sea extends into the open sea for a distance of three miles measured from low-water mark. But many states have in fact exercised jurisdiction beyond this limit for the purpose of protecting their neutrality in time of war, for the enforcement of health, police, and revenue legislation, and for the protection of fisheries, coral reefs, and the like. The exercise of jurisdiction for these purposes has frequently been acquiesced in by other states but it has produced many conflicts and protests. The right of Norway, Sweden, Uruguay, and other states to extend their jurisdiction beyond the three-mile limit during the World War for the purpose of protecting their neutrality was not recognized by Great Britain or Germany. There is, it must be admitted, an increasing sentiment in favor of an extension of the three-mile limit.<sup>13</sup> Regarding the nature of the right of the state over the territorial sea whether it is a right of sovereignty or a mere right of jurisdiction- there has been much discussion.<sup>14</sup>

**(2) The Superincumbent Air Space.**—In consequence of the recent development of aviation and radio-telegraphy, by which the aerial space is capable of being utilized for commercial navigation, for the transmission of wireless telegrams, and as a theater for the conduct of war, the nature and extent of the rights of subjacent states over the air space has assumed great importance. Concerning the nature and extent of these rights there has been much discussion by jurists

<sup>11</sup> Fauchille, *op. cit.*, pp. 131 ff., and the numerous authorities there cited.

<sup>12</sup> See the report of the subcommittee on territorial waters, in *Amer. Jour. of Int. Law, Spec. Supp.* July, 1926, pp. 63 ff., and its recommendations.

<sup>13</sup> The history and present practice are discussed by Professor G. G. Wilson in his lectures before the Academy of International Law at the Hague in 1923. *Recueil des Cours, Académie de Droit International* (1923), pp. 127 ff. See also Fraser, "The Extent and Delimitation of Territorial Waters," *Cornell Law Quarterly*, vol. XI (1926), pp. 455 ff.; and Dickinson, "Jurisdiction at the Maritime Frontier," *Harv. Law Rev.*, vol. XL (1926), pp. 1 ff.

<sup>14</sup> Fauchille (*op. cit.*, p. 147) suggests that it is a right neither of sovereignty nor of jurisdiction, but merely a right of conservation. But the exercise of the right of conservation necessarily involves the right of jurisdiction, if not sovereignty.

and learned societies, a vast amount of literature on the subject has been produced, and various theories have been advanced and solutions proposed.<sup>45</sup> With the passing of time the view that the subjacent state should be admitted to have the full right of sovereignty over the air space above it came to prevail generally, and by the International Air Convention concluded at the Peace Conference in 1919 this right was affirmed. By article I of this convention the high contracting parties "recognize that every state has complete and exclusive sovereignty in the air space above its territory and territorial waters." By article II, however, they undertake, in time of peace, to allow freedom of innocent passage above this territory, provided the conditions established by the convention are observed. The convention appears to have been ratified up to the present time by twenty-eight states, mostly European. Until it is generally ratified, the rule of sovereignty which it affirms cannot, therefore, be admitted to be a rule of international law. There is still much criticism of this solution of the question, since it is believed to concede too much to individual state control over the air space at the expense of the freedom of international navigation. As it stands, any and every state is left free to prohibit international aerial navigation above its territory, for such reasons as it may deem sufficient, and if it allows the right of innocent passage it may prescribe the routes to be followed by aviators. Land-locked states, therefore, like Switzerland, Austria, Czechoslovakia, Bolivia, and others, may be deprived of access to the outside world through the air space, while those which are fortunate enough to have outlets upon the sea may be compelled to follow sea routes, if their neighbors choose not to allow the right of innocent passage above their territories.<sup>46</sup>

**Doctrine of Natural Boundaries and Sea Outlets.**—In connection with the discussion of the territory of the state much might be said regarding the importance of boundaries, especially in respect to the weakness of artificial boundaries and the value of so-called "natural" frontiers. The contention has at times been put forward that every state has a right to a natural boundary in the sense of a

<sup>45</sup> They are reviewed in my "Recent Developments in International Law" (1925), ch. 4, and in Fauchille, *op. cit.*, pp. 581 ff. In both works numerous citations of the literature will be found.

<sup>46</sup> See my "Recent Development in International Law," p. 160, and the trenchant criticism of Blewett Lee, in *Harvard Law Review*, vol. XXXIII, pp. 23 ff.

strategic frontier, in case one can be found, such as a river or a mountain range. While it has never been admitted in the sense that a state without such boundaries has a right to extend by forcible appropriation, if necessary, its frontiers at the expense of other states, the value of strategical frontiers has sometimes been taken into consideration by peace conferences in redrawing national boundaries. Thus, it was on considerations of this kind that the peace conference at the close of the World War yielded to the demand of Italy and assigned to her the South Tyrol of Austria, inhabited almost entirely by a German population.

It has likewise been contended that a landlocked state has a natural right to an outlet on the sea. This claim is based in part on the doubtful argument that since the free navigation of the high seas is a universally recognized right the people of a country which has no access to the sea should, in order to be able to avail itself of this right, be given one.<sup>47</sup> The lack of such access was one of the standing grievances of Serbia prior to the World War. President Wilson, who apparently sympathized with Serbia's demand, declared in his address of January 18, 1918 (enunciating the "fourteen points"), that "Serbia must be assured access to the sea." A like demand was made upon the peace conference by other peoples and their claims were, in some degree at least, recognized. Thus, Poland was given certain rights in the free city of Danzig to insure her an access to the sea<sup>48</sup>; Bulgaria was given an outlet on the Aegean Sea<sup>49</sup>; by the internationalization of the river Elbe, Czechoslovakia was given access to the North Sea;<sup>50</sup> Memel was detached from Germany and given to Lithuania, in order to insure to that state an outlet to the sea. There still remain, however, several states in Europe and one in South America which are without access to the sea. It would manifestly be a great advantage to them to have such an outlet, but it can hardly be said that it can be claimed as a right under international law. As Fauchille remarks, the theory of "obligatory access," if admitted, would involve a remaking of the map of the world.<sup>51</sup>

<sup>47</sup> Compare Fauchille, *op. cit.*, pp. 30 ff.

<sup>48</sup> Treaty of Neuilly, Art. 49.

<sup>49</sup> Treaty of Versailles, Art. 104.

<sup>50</sup> Treaty of Versailles, Art. 331.

<sup>51</sup> *Op. cit.*, p. 33. Compare also Dupuis, "La liberté des mers," in the *Journal de droit int. pub.*, vol. XLVI, p. 604.

**Extent of Territorial Area Necessary.**—As in the case of population, no rule can be laid down as to the extent of territory necessary to form a state. As a matter of fact the existing states of the world vary in territorial area from a few square miles—the republics of San Marino and Monaco, for example<sup>52</sup>—to vast empires covering millions of square miles, such as China, Great Britain with its colonies, Russia, and the United States. It would be absurd, therefore, as Bluntschli remarked, to attempt to lay down any rule as to the minimum or maximum area which a state must have.<sup>53</sup> During medieval times the area of states was uniformly small. Until a comparatively recent date the number of states in Europe was more than four hundred. Nearly every seigniory, many towns, and even religious establishments were, in appearance, at least, states during the Middle Ages. As late as the early nineteenth century the territory now embraced within the limits of Germany was parceled out among the rulers of more than 300 petty states. The present Italian state was equally a patchwork of petty kingdoms, republics, and principalities. Other existing states were similarly divided.

In former times, theory as well as practice was in favor of the system of small states—*die Kleinstaaterie*, as the Germans call it. Plato drew an analogy between the stature of a well-formed man and the size of a normal state,<sup>54</sup> and Aristotle appears to have favored states of moderate size.<sup>55</sup> Even eighteenth-century writers on political science were generally hostile to the idea of large states. Rousseau,<sup>56</sup> publishing Plato's analogy, declared that just as nature has set limits "the nobler stature of a normal man, so it has equally set limits to the power," the well-governed state. It ought not, therefore, to be too vast to enable it to be well governed nor too small to enable it to be self single-handed. Administration, he said, becomes difficult distances as a weight becomes heavier at the end of a long lever.<sup>57</sup> The argument is that too different conditions are enforced with less vigor and celerity in remote and distant communities, while the people feel less affection for a government so far removed from a common center. Jefferson

<sup>52</sup> Mention might also be made of the former petty republic of new growth situated between Belgium and Germany, which covered only about 1000 acres and contained a population of about 3500 persons. It was under the joint tutelage of the control of Belgium and Prussia until 1919, when it was annexed to Prussia by the treaty of Versailles. <sup>53</sup> "Theory of the State," p. 237. <sup>54</sup> "Laws," based on conditions

<sup>55</sup> "Politics," bk. IV, ch. 4.

removed that they rarely come in contact with it. The more the social bond is extended, he asserted, the more it is weakened, and he added : "in general, a small state is proportionally stronger than a large one." He maintained further that there is a necessary relation between the size of the state and the form of government best adapted to it. His conclusion was that monarchy is suited only to large states, aristocracy to states of moderate size, and democracy to small states.<sup>56</sup>

Montesquieu, like Rousseau, maintained that there is a relation between the size of the state and the form of government best suited to it, and he laid down categorically the dogma that the republican form is best suited to states of small area, the monarchial form to states of moderate area, and the despotic form to those of vast extent.<sup>57</sup>

De Tocqueville, like Montesquieu, was also of the opinion that the republican system of government is unsuited to large states. "The history of the world," he said, "offers no instance of a great nation retaining the form of a republican government for a long series of years. It may be advanced with confidence that the existence of a great republic will always be exposed to far greater dangers than that of a small one. . . . All the passions which are most fatal to republican institutions spread with an increasing territory, while the virtues which maintain their dignity do not augment in the same proportion."<sup>58</sup>

John Stuart Mill, if one more opinion may be quoted, like Rousseau, emphasized the difficulty of governing states of vast area. was given<sup>59</sup>, he said, "a limit to the extent of country which can be of the river Memel wa order to in however, s are without be claimed by." The theoretical claim to the alleged non-adaptability of the republican form of government-making<sup>60</sup> social Contract," bk. II, chs. 6, 8.

"The Spirit of the Laws" (1748), bk. VIII, chs. 16-20.

<sup>56</sup> "Democracy in America" (trans. by Reeves), vol. I, p. 170. De Tocqueville

<sup>57</sup> That "it may be asserted as a general proposition that nothing is more

<sup>58</sup> "Op. c. the well-being and freedom of man than vast empires. . . . If none but de droit int. F. ntitative Government," ch. 17.

ment to large states, it may be sufficient to quote the remark of a well-known English scholar that "the foundation of the United States of America. . . . proved that a great modern state could adopt the republican form."<sup>60</sup> The success with which Great Britain has governed a vast empire is an equal refutation of the theory that large states cannot be well governed. The contrary opinions quoted above were, for the most part, advanced in an age when railroads, telegraphs, and fast-sailing steamships were non-existent and when, consequently, communication by governments, with their distant territories and peoples was slow and difficult. The principles of decentralization, federalism, and local self-government were also largely unknown at that time. The introduction of rapid means of communication in the nineteenth century and the development of the principles of federalism and autonomy in government have greatly simplified the task of governing large states. Under the circumstances the former skepticism regarding the possibility of governing successfully such states was natural and in great measure well founded.<sup>61</sup>

**The Value of Small States Denied.**—The disregard by Germany of the rights of certain small states during the World War and the making known to the English-speaking world of the somewhat contemptuous attacks of Treitschke and other German writers upon small states generally, provoked widespread discussion of the relative value of large and petty states as agencies for the advancement of civilization. Treitschke in his work on "Politics" (*Politik*), published some years before the war, declared that large states are "the nobler type." Emphasizing again and again that "the state is power," the lack of which is "a sin against the Holy Ghost," he said, "it is manifest

<sup>60</sup> Fisher, "The Republican Tradition in Europe" (1911), p. 67.

<sup>61</sup> In the debates on the Constitution of the United States, in 1788, the argument was advanced that the territorial extent of the union was "too vast and too differently circumstanced to make a general government possible." See "The Federalist," No. 1. Madison answered the objection that a republican government must be confined to a small district by pointing out that the objection was due to a confusion of republican government with democracy. *Federalist*, No. 14. Jefferson wrote, in 1801, of the triumph of the Democratic party: "It furnishes a new proof of the falsehood of Montesquieu's doctrine that a republic can be preserved only in a small territory. Had our territory been only a third of what it is, we were gone." Ford's edition of *The Federalist*, p. 50. But, says Ford, time would have justified the predictions of the objectors but for the changed conditions wrought by the railroad and telegraph. *Ibid.*, p. 6, note 1.

that it is only the state that is really powerful that corresponds to our idea." The idea of the small state, he said, is ridiculous on account of its weakness, which in itself is reprehensible because it masquerades as strength. In small states, "that ruling spirit is hatched which judges the state by the taxes it levies"; and a materialism is generated which has a deleterious effect upon the citizens. Furthermore, small states are "totally lacking in that capacity for justice which characterizes their greater neighbors," and what is of even more importance, they "cannot wage war with any prospect of success." The economic superiority of large states, he added, is patent; they can overcome economic crises more easily; the outlook of their citizens upon the world is freer and larger; culture matures more readily in them than in the narrow limits of a small state; art and science flourish more abundantly in them; and only in large states "can there be developed that genuine national pride which is the sign of the moral efficiency of a nation." Large states "are more adapted than small ones to promote the development of intellectual culture."<sup>62</sup>

Although there is some truth in Treitschke's evaluation of small states, there is much exaggeration, and the somewhat sneering manner in which he referred to them provoked vigorous criticism from many quarters. Before Treitschke, a great English historian, Lord Acton, had expressed (1862) an unfavorable opinion of the value of small states as instrumentalities for the promotion of civilization, but his criticism was less violent and better reasoned. Among other things he said:<sup>63</sup> "Their tendency is to isolate and shut off their inhabitants, to narrow the horizon of their views, and to dwarf in some degree the proportions of their ideas. Public opinion cannot maintain its liberty and purity in such small dimensions, and the currents that come from larger communities sweep over a contracted territory. . . . These states, like the minuter communities of the Middle Ages, serve a purpose, by constituting partitions and securities of self-government in the larger states; but they are impediments to the progress of society, which depends on the mixture of races under the same governments." More recently still the German writer Ratzel, in his "Politische Geographie"

<sup>62</sup> See his "Politics" (English translation by Dugdale and Torben de Bille), vol. I, especially pp. 32-41.

<sup>63</sup> "History of Freedom and Other Essays," p. 295.

(2d ed., 1903), condemned small states on the ground that they were contrary to scientific laws, particularly the law of evolution, and that in consequence they were doomed to disappear in the struggle with more powerful states which would ultimately absorb them. History showed, he argued, that states in their evolution pass through three stages; first, that of the village-state (*Dorfstaat*); second, the city-state (*Stadtstaat*); and third, the country-state (*Landstaat*). As the first two in turn had disappeared, so the petty states of the third class which still exist as abnormal survivals would disappear in turn.

It must be admitted that large states do possess advantages over small ones. Their resources for maintaining the national existence according to a high standard, for promoting the material forms of civilization, and for defense against attack, are likely to be much greater than those of small states.

It is also true, as Acton and Treitschke pointed out, that the range of vision, the outlook of the citizen, and the national pride which comes from membership in a powerful state are not without moral and cultural value. Finally, the existence of a multiplicity of small states on a given continent intensifies the difficulty of maintaining the general peace. "Other things being equal, the fewer sovereign bodies there are entering into direct relations with each other, the less complicated those relations and the issues between the states will be, the less likelihood there will be of incalculable disturbing factors hampering the cause of peace, and the greater will be the possibility of establishing the rule of law."<sup>61</sup> Opinion is by no means lacking in support of the view that the recent multiplication of petty states in Europe will have the effect of increasing international conflicts and perhaps of international wars, although it has undoubtedly diminished the possibility of internal dissension by giving satisfaction to the political aspirations of the discontented nationalities.

<sup>61</sup> Greenwood, "The Nature of Nationality," *The Political Quarterly*, Feb., 1915, p. 92. Compare also an article entitled "Nationalism and Internationalism," in the *Round Table*, Dec. 1914 (pp. 61-62), where it is asserted that the great number of existing nations "is manifestly the greatest of all obstacles" to the growth of a common consensus among the peoples of Europe. The author of this article adds: "international relations will benefit universally....by the reduction of the number of sovereign states. A stable concert can never be attained, indeed, by any other means."

**Defense of Small States.**—But when all is said against small states that can be said, it must be admitted that some of them have played an important rôle in the history of civilization, and their contributions to art, science, literature, and intellectual life of the world have compared favorably with those of much larger states.<sup>65</sup> The power of a state is not necessarily to be measured by the extent of its territory or even by the strength of its military and naval forces or by the conquests it has made, but rather by the contributions it has made through its art, its science, and its literature, to the cause of human progress and civilization, and by the achievements it has accomplished in social and political reform.<sup>66</sup> The Greek city-states, as Bluntschli remarked looked petty in the face of the Roman Empire, but Athens takes her place beside Rome in the history of the world.<sup>67</sup> The terri-

<sup>65</sup> Comte defended the system of small states on grounds that were the direct opposite to those upon which Ratzel condemned them. The law of evolution, according to him, showed that the progress of human societies is away from large states to small ones. The great empires of the past : the Macedonian, the Roman, the Arabian, the Carolingian, the Mongolian, the Spanish, the Ottoman, and that of Napoleon, had all dissolved under the operation of this law and in their places a succession of smaller states had been established. Even France, he thought, was too large and he proposed its division into seventeen small states. "Système de politique positive," vol. IV, ch. 5.

<sup>66</sup> Compare Greenwood, article cited, p. 94.

<sup>67</sup> "Theory of the State," p. 237. See also the vigorous defense by Dr. H. A. L. Fisher in his "The Value of Small States," Oxford Pamphlets (1914), pp. 24-25. reprinted in his "Studies in History and Politics," pp. 161 ff. Mr. Fisher points out that some of the most precious contributions to civilization have come from small states: the Old Testament, the Homeric poems, the Attic and the Elizabethan drama, the art of the Italian Renaissance. "Nobody needs to be told," he adds, "what the world owes to Athens, Florence, Geneva, or Weimar." An equally strong defense of small states is made by M. Barthélémy in his "Démocratie et politique étrangère" (1917), pp. 184 ff. Contrary to the thesis of Ratzel, he says, it could be shown that all the great *œuvres de l'esprit* came from small states and that their contributions to humanity were the most notable. It is to Rome, he adds, that we owe the strongest juridical conceptions; the immortal monuments of literature and art were born in petty countries like Athens, Florence, Holland, and England in the time of Elizabeth, England in the time of Shakespeare was no greater than Sweden to-day; London no larger than the Christiania of Ibsen. It was the petty German states which gave the world Beethoven, Bach, Goethe, Schiller, and Kant. The greatest sculptor of the world was born in a petty Italian republic; the greatest painter was a Dutchman: Norway has given us Ibsen; Belgium, Maeterlinck and Verhaeren, etc. Another writer (Buell, "International Relations," p. 22) points out that it was small nations which produced Demosthenes, Dante, and Machiavelli, and that Denmark with

total areas of Great Britain proper, Germany, and France look like communes on the map of the world in comparison with those of Russia and China, but measured by any other than quantitative standards they are much more powerful states than either of the latter. Among still smaller existing states whose contributions to the sum total of civilization have been vastly greater than those of much larger states, may be mentioned Belgium, Denmark, the Netherlands, and Switzerland.

### III. OTHER ELEMENTS AND ATTRIBUTES OF THE STATE

**Necessity of Government.**—An aggregation of people permanently resident on a given territory does not necessarily constitute a state. It is necessary that they should be politically organized ; they must have a government, through which the collective will may be formulated, expressed, and executed. Government is the agency or machinery through which common policies are determined and by which common affairs are regulated and common interests promoted. Without a government the population would be an incoherent, unorganized, anarchic mass with no means of collective action. No particular type of government is essential. The government may be of a simple rudimentary type with few organs and few functionaries ; on the other hand, it may be a very elaborate and complex organization operated by an army of public officials and employees. It must, however, be so organized and must possess the power and resources necessary to enable it to enforce generally its commands and compel respect for its authority, otherwise it will be unable to maintain internal peace and order or to perform the international obligations which international law imposes on a state as a condition of membership in the family of nations.

a population of less than 3,000,000 has received seven of the Nobel prizes, tying with the United States with a population of 100,000,000. For further discussion of the value of small states see Richard, "L'avenir des petits états d'après les lois sociologiques" (1912) ; Castberg, "The World War and the Small States," *Contemporary Review*, June, 1917, and Beyens, "L'avenir des petits états" (1919). Lord Bryce ("Modern Democracies," II, 444) pointed out that it was in small states that democracy first arose, that it was from them that the theories of its first prophets and apostles were derived ; and that it is in them that the working of the real will of the people can best be studied. It was, he added, war and the fear of war that destroyed so many of the small states. If this fear could be removed many of them, he said, might reappear in the course of time.

**Independence of Foreign Control.**—But a people, inhabiting a definite portion of territory and having a government, do not necessarily constitute a state. They must also be independent, or largely so, of foreign control. If they are subject to the control of another state which sets limits to their power, regulates their affairs, and exercises the power of government over them generally, they do not constitute a state but are a part of the state which exercises control over them. Nevertheless, if this control is only nominal or is exercised merely in respect to their foreign affairs, they may be regarded for all practical purposes as a state, even if in strict legal theory they are not. Thus the great self-governing dominions of Great Britain—such as Canada, Australia, and the Union of South Africa—may rightfully claim to be regarded as states in this sense. They have acquired almost complete autonomy in respect to the determination of their forms of government and the administration of their own affairs; they have recently been allowed to participate in international conferences on a footing of equality with the mother country; their representatives have signed the treaties concluded at such conferences; they have been admitted to membership in the League of Nations and as such are also on a footing of equality with Great Britain; and Canada, at least, has recently been permitted to exercise the power of negotiation in respect to matters affecting primarily her own interests, and is free to be represented in foreign countries by her own diplomatic representatives.<sup>68</sup> The Irish Free State is the British dominion which has most recently acquired the rank of a nearly independent state; formerly a mere part of the kingdom of Great Britain and Ireland, it has recently acquired the same status as Canada, and is represented by a Minister at Washington.

Similarly, it may be said that so-called protected states over which the protecting state exercises control merely in respect to foreign affairs, although not entirely independent, are entitled to be regarded as states.

<sup>68</sup> As to this, see Keith, "The Dominions and the Treaty Power," *Jour. of the Soc. of Comp. Leg. and Int. Law*, 3d ser., vol. VI (1924), p. 163; Stevenson, "Canada and Foreign Policy" in *Foreign Affairs*, vol. I (1923), pp. 108 ff.; Allin, "Canada's Treaty-Making Power," *Michigan Law Review*, Jan., 1923, pp. 249 ff.; also his article on "Recent Developments in the Status of the British Dominions," 10 *Minn. Law Review* (1926), pp. 100 ff.; and Lowell, "The Treaty Making Power of Canada," *Foreign Affairs*, Sept., 1923, pp. 16 ff.

**Internal Sovereignty.**—Another characteristic or condition which is generally regarded as essential to the existence of a state is internal sovereignty. That is to say, there must be some person, assembly, or group which has the supreme, exclusive, and unlimited legal power of ultimate control over all persons and things within the territorial limits of the state. It is this power which distinguishes fundamentally the state from all other human organizations or associations. From this essential principle there follows as a corollary two other characteristics of the state, namely, the quality of *all-comprehensiveness* and *exclusiveness*—*exclusivité*, as the French call it. That is to say, the sovereign jurisdiction of the state embraces, as has already been pointed out, authority over all persons and things within its territorial limits except those over whom it has waived its jurisdiction by treaty concessions, through considerations of international comity, or in pursuance of universally accepted rules of international law. Subject to these exceptions, the modern theory of sovereignty does not recognize the existence in the territory of a state of any "stateless" persons, that is, "stateless" in the sense of being exempt from its jurisdiction. If a state were unable to exercise successfully, or should refrain from exercising, jurisdiction over any considerable portion of its population, it would in all probability soon cease to be a state, through internal disintegration or conquest and absorption by another state.

By the principle of *exclusiveness* is meant the monopoly by the state alone of the right of political government within its own territories. It means that there can be but one state organization upon the same territory over the same people. It does not admit the right of another state to exercise jurisdiction within its territory nor does it permit any other association or organization, domestic or foreign, to do so. An *imperium in imperio* cannot be tolerated in the modern state. A state may, of course, for convenience or utility, divide the powers of government and confer some of them on a central government and others on a local government, both of which co-exist in the same territory, but this does not involve the existence of two different state organizations within the same territory.<sup>69</sup>

<sup>69</sup> As pointed out above, the rare and anomalous situation resulting from the so-called *condominium* constitutes an exception to the general principle here stated.

**The Element of Permanence.**—Another quality often attributed to the state is that of *permanence*.<sup>70</sup> This means that a people once organized as a state remain always under some state organization. Additions or partial loss of territory resulting from cessions, conquest, or the operation of natural forces do not affect the juridical existence of the state. This does not mean, of course, that the existence of the particular state may not be extinguished through annexation to another state, or by voluntary merger with other states to form a new state—history furnishes many such examples. In such cases, there is merely a transfer of sovereignty from one state to another; the people continue to remain under some state organization, though a different one. They do not revert to a condition of anarchy. In this sense, therefore, the state is permanent and enduring.

**Continuity of the State : State Succession.**—It is the same with changes in the form of the state or its government. Forms of government are frequently changed; monarchies are transformed into republics or republics into monarchies; absolute systems are substituted for constitutional systems of the reverse; existing dynasties are replaced by others; new constitutional régimes displace old ones, etc.,<sup>71</sup> but ordinarily such changes do not affect the identity of the state or its international obligations. This principle is known as the doctrine of the *continuity of the state*, and from it follows another principle known as the doctrine of *state succession*, according to which, when the sovereignty is transferred from one state to another or one government is replaced by another, the annexing state or the new government generally becomes the successor to the public property, the assets, the liabilities, and the obligations of the old state or government. As to whether the successor state is bound by international law to take over the debts and other contractual obligations of the old state or government in all cases there is a difference of opinion. In a famous case the King's Bench Division of the British High Court of Justice denied

<sup>70</sup> Compare Burgess, "Political Science and Constitutional Law" (1921), vol. I, p. 52.

<sup>71</sup> France, for example, set aside its dynasty, transformed its government from a monarchy to a republic, then to an empire, again to a monarchy, then became a republic again, again an empire, and is now a republic for the third time, but the continuity of the state as such has remained unchanged throughout all these successive transformations.

that international law imposed on the successor state any such broad obligation and affirmed that in the absence of a conventional agreement to the contrary, the assumption of the obligation was entirely within the discretion of the succeeding state.<sup>72</sup> The American courts have also denied the existence of such an obligation in respect to certain contracts.<sup>73</sup> Notwithstanding the opinion of the British court referred to above, however, the British government has generally assumed and executed the contractual obligations to which it succeeded, and this has been the usual practice of other states, especially where the contracts were made in the public interest and were not contrary to the public policy of the successor state. As is well known, the refusal of the Russian Soviet government to assume the payment of the public debts incurred by the imperial and Kerensky governments has constituted one of the chief reasons for the refusal of the government of the United States to recognize the Soviet government as the *de jure* government of Russia.<sup>74</sup> Treaties of peace, of annexation, and of partition usually make provision for the taking over of the public debts and other contractual obligations of annexed states.<sup>75</sup>

*The Equality of States.*—An attribute, right, or principle (all three terms have been used) which is commonly said by writers, especially on international law, to belong to the state is that of equality in relation to other states. Thus Oppenheim, one of the most authoritative of them, says, "The equality before international law of all member states of the family of nations is an invariable quality derived from their international personality. Whatever inequality may exist

<sup>72</sup> *West Rand Gold Mining Co. v. The King*, 2 K. B. 391 (1905).

<sup>73</sup> See among others the decisions in Evans, "Cases on International Law," pp. 103, 322-325.

<sup>74</sup> See Young, "Attitude of the United States Government toward the Soviet Régime," *Ann. Amer. Acad. of Pol. and Soc. Science*, July, 1924, pp. 70 ff., and "Why America Refuses to Recognize Russia," *N. Y. Times Current History* 1923, pp. 286 ff.

<sup>75</sup> As to the doctrine of the continuity of the state, see Moore, "Digest of International Law," vol. I, pp. 248 ff.; Oppenheim, "International Law" (3d. ed., 1930), vol. I, pp. 140 ff.; Fauchille, "Droit int. pub." (1922), vol. I, pt. I, ch. 3; the decisions of the U. S. Supreme Court in the cases of the *Sapphire*, 11 Wall. 1-4 (1871), and *Keith v. Clark*, 97 U. S. 454 (1879); and the notes in Evans, "Cases on International Law," pp. 81-83.

Regarding the doctrine and practice as to state succession see Moore, *op. cit.*, vol. I, ch. 4; Oppenheim, *op. cit.*, vol. I, pp. 144 ff.; Fauchille, *op. cit.*, pp. 391 ff.;

between states as regards their size, population, power, degree of civilization, wealth, and other qualities, they are nevertheless equals as international persons."<sup>76</sup>

Unfortunately, the term has been used in various senses and has consequently led to much confusion of thought. Some writers have employed it to mean equal protection of the law or equality before the law; others, as equality in the sense of equal capacity for rights, or simply as equality of rights--two very different things. Most writers also fail to distinguish between *political* equality, that is, the right to an equal voice in international councils, and *legal* equality, or equality of standing and of protection before the law. According to those who assert the broad principle of equality it follows that in the determination of international questions each state has a right to one vote and one only; the vote of each state should have the same weight as the vote of every other state; and unanimity is necessary to an agreement.<sup>77</sup> Equality not only in the sense of equal protection of the law but equality of voice in international conferences and even equality of representation in international institutions was asserted as a right by the representatives of various small powers at the Second Hague Conference in 1907, and their insistence upon equal representation with the great powers on the proposed Court of Arbitral Justice made

Huber, "Die Staaten Succession"; Keith, "The Theory of State Succession." See also the opinion of Chief Justice Taft as arbitrator in the case of *Great Britain v. Costa Rica* (1923), text in *Amer. Jour. of Int. Law*, Jan., 1924, pp. 147 ff. As to the provisions of the treaties of peace at the close of the World War in regard to succession in the case of treaties, contracts, public property, debts, etc., see my "Recent Developments in International Law" (1925), pp. 412-416.

<sup>76</sup> "International Law" (3d ed., 1920), vol. I, p. 196. Various other opinions are quoted in Dickinson, "The Equality of States in International Law" (1920), pp. 102, 112. M. Bourgeois, President of the French delegation at the Second Hague Peace Conference (1907), declared: "Each nation is a sovereign person equal to others in moral dignity, and having, whether small or great, weak or powerful, an equal claim to respect for its rights, an equal obligation in the performance of its duties." *La douzième conférence de la paix*, vol. II, p. 88. Compare in the same sense also the address of Secretary of State Hughes as presiding officer of the conference on Central American affairs (1923). The American Institute of International Law in its "Declaration of the Rights and Duties of Nations" (Dec., 1915) affirmed that "every nation is in law and before law the equal of every other nation belonging to the Society of Nations"; *Amer. Jour. of Int. Law*, X (1916), p. 211.

<sup>77</sup> Oppenheim, *op. cit.*, vol. I, p. 196.

impossible an agreement upon the organization of the court, although the Conference was unanimous in favor of its establishment.

The basis of the theory of equality, it may be remarked, had its origin in the theories of the pure natural law writers of the eighteenth century, such as Pufendorf, who argued from the analogy which they drew between men in a state of nature and independent states which, having no common superior, were considered to be in a state of nature in their relations with one another. They concluded that as men are equal in a state of nature, states are similarly equal.<sup>78</sup>

**Criticism of the Doctrine of Equality.**—So far as equality of states before the law and the right of equality of protection by the law are concerned, there is little or no difference of opinion. But the claim that all states are equal in the sense of being entitled to an equal voice in the determination of international questions and to equality of representation in international organizations has been vigorously attacked in recent years. The truth is, the doctrine in this form never has been much more than a legal theory and in the most recent of the great international conferences—the Peace Conference of 1919—the theory was in practice virtually thrown overboard, important decisions being determined by the plenipotentiaries of the great powers.<sup>79</sup> The theory was also abandoned in the organization of the Council of the League of Nations.

The theory had already ceased to be in accord with the facts of international practice. For many years the great powers of Europe—the European Concert—had assumed and exercised in fact a large control over affairs of general European interest. Without obtaining the consent of the smaller powers, they had created new states, established new dynasties, approved constitutions, fixed boundaries, intervened in the affairs of other states, and in general had exercised the power of guardians, trustees, and directors of European affairs.<sup>80</sup> In view of these facts some writers, such as T. J. Lawrence, have argued that the supremacy of the great powers in Europe must now be

<sup>78</sup> See Dickinson (*op. cit.*, chs. 2-3), who dwells upon the falsity of the analogy and absolves Grotius from the charge of having taught the doctrine.

<sup>79</sup> See Buell, "International Relations" (1925), p. 643; and Armstrong, *Amer. Jour. of Int. Law*, XIV (1920), pp. 540 ff.

<sup>80</sup> As to the principal facts, see my "Recent Developments in International Law" (1925), pp. 594-602, and the sources there cited.

recognised as being an established principle of international law ; and that the old doctrine of absolute equality of states is dead and ought to be abandoned.<sup>81</sup> The doctrine of equality has been one of the chief obstacles to the organization of the world for the maintenance of international peace and the advancement of other common interests. It has therefore become a " positive political danger."<sup>82</sup> Professor Brown of Princeton University justly remarks that : " If nations are not equal in moral, intellectual, or even material influence ; if they have not an equal concern in the adjustment of international interests ; if they have not an equal voice in the creation, the interpretation, and the enforcement of law ; if, in fact, the claim to equality stands squarely in the way of world organization itself ; then it is folly to insist on the concept of equality as a basic principle of the law on nations."<sup>83</sup>

<sup>81</sup> " Essays on International Law " pp. 209, 232 ; " Principles of Int. Law," sec. 114.

<sup>82</sup> Baker, " The Doctrine of Legal Equality of States," *British Year Book of International Law*, 1923-1924, p. 4, and McNair, " Equality of States," 26 *Mich. Law Review* (1927), pp. 131 ff.

<sup>83</sup> " International Realities " (1917), p. 15. Professor Hicks (*Amer. Jour. of Int. Law*, II, 1908, p. 535) characterizes the doctrine of equality as one which was " untrue in its origin, was preserved in international law by a verbal consent which is not followed by performance, and was bolstered up by false analogies growing out of a confusion in thought between international and positive law."

## CHAPTER VI

### STATE, NATION, AND NATIONALITY

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#### I. STATE, NATION, AND NATIONALITY DISTINGUISHED

**Terminology.**—The terms "state" and "nation" are frequently identified both in popular usage and in scientific discussion. Both terms, and also the term "nationality," have acquired various meanings, and the looseness with which they are employed, even by scientific writers, has been productive of much confusion and misunderstanding. In the first place, they have an etymological meaning

which is different from that which they have acquired in popular usage. Again, the terms "national" and "nationality" are used both as nouns and in an adjectival sense. Here, as elsewhere, there is urgent need for a more precise terminology and an agreement among writers on political science regarding the meaning of these much-used terms. The word "nation" is derived from the Latin word *natio*, which connotes the idea of birth or race. Etymologically, therefore, a nation is a people having a common ethnic origin, but as stated above, the term has acquired both a scientific and a popular signification which is very different from the etymological meaning. Many writers also use the term "nation" in the sense of "nationality," while others identify it with "state." The confusion is further increased by the difference of meaning between the German and English words "nation." Many German writers use the word *Nation* in its original etymological ethnic sense, the English equivalent of which is "nationality," while the English word "nation" has acquired a political meaning which is expressed by the German word *Volk*, the English equivalent of which is "people." The German usage is undoubtedly more scientific and accurate, yet it would increase the confusion to disregard the established usage merely for the sake of conformity to etymological meanings.<sup>1</sup>

**The Nation Defined ; Ethnic Factor.**—Burgess, adhering to the etymological meaning, defines a nation as "a population of an ethnic unity, inhabiting a territory of a geographic unity."<sup>2</sup> But this definition has been criticized because neither popular usage nor political science generally regards the nation as merely an ethnic aggre-

<sup>1</sup> Compare Gilchrist, "Principles of Political Science" (1921), p. 30. Willoughby, "The Nature of the State" (1903), p. 9; and Bluntschli, "Theory of the State," p. 86. Unfortunately the English translators of Bluntschli's work have translated the term *Volk* employed by him, as "nation," and the term "*Nation*" used by him, as "people." It is quite clear that Bluntschli used the terms in the reverse sense, that is, the German word *Volk* connoted to him a political concept, whereas the German word *Nation* was intended to carry an ethnic meaning. A *Nation*, he said, "is a union of masses of men . . . bound together, especially by language and customs, in a common civilization which gives them a sense of unity and distinction from all foreigners, quite apart from the bond of the state," whereas a "people" (*Volk*) is "a society of all the members of a state united and organized in the state" (p. 90). In the same sense compare Gumplovicz, "Allegemeine Staatslehre" (ed. 1907), pp. 107-110.

<sup>2</sup> "Political Science and Constitutional Law," vol. I, p. 1.

gation nor do they consider that geographic unity is essential.<sup>3</sup> Professor Burgess adds that by "ethnic unity" he means "a population having a common language and literature, a common tradition or history, a common custom and a common consciousness of rights and wrong." His insistence upon the element of "common language" as an essential mark of ethnic unity has also been criticized as not being in accord with the results of ethnological research.<sup>4</sup>

The French publicist Pradier-Fodéré likewise conceived the nation to be primarily an ethnic rather than a politically united aggregation. "Affinity of race, community of language, of habits, of customs and religion, are," he said, "the elements which constitute the nation."<sup>5</sup> Calvo, in his work on "International Law," held substantially the same opinion, emphasizing the fact that the idea of the nation is associated with origin or birth, community of race, community of language, etc.<sup>6</sup> This conception of a nation, which makes community of race and language its primary essential elements, is in accordance with etymology but not with present-day popular or general scientific usage.

**Non-Ethnic and Linguistic Factors.**—The bonds which make a people a nation are not necessarily ethnic and linguistic, although those are undoubtedly the most important factors. Thus the Swiss people constitute a nation, as the term is now generally used, that is, in the political sense, but they are not of the same race nor do they possess a common language. So the Belgians constitute a nation in the same sense, although the population is partly Walloon and partly Flemish and they speak different languages. Community of race implies kinship, while community of language affords the medium through which a people may understand one another more easily. A common language also facilitates intellectual and social intercourse, and thus opens the way for the development of a common consciousness. But there are other important factors which go to make a

<sup>3</sup> Compare Holcombe, "Foundations of the Modern Commonwealth" (1923), p. 131.

<sup>4</sup> Hankins, "Race as a Factor in Political Theory," in Merriam, Barnes, and others, "Political Theories, recent Times" (1924), p. 532.

<sup>5</sup> "Traité de droit int. pub.", vol. I, p. 126. See also his "Principes généraux de droit de politique et de législation," pp. 184 ff.

<sup>6</sup> "Droit international théorique et pratique," vol. I, p. 169.

people a nation, as the term is generally employed. M. Renan, in his oft-quoted discourse at the Sorbonne in 1818, *Qu'est ce qu'une nation?*<sup>7</sup> declared that it was not community of language and race which makes a people a nation but the sentiment of a common heritage of memories, whether of achievement and glory or of suffering and sacrifice, together with a desire to live together in the same state and to transmit their heritage to their posterity. It is the will of a people to live together, the *vouloir-vivre collectif*, says M. Hauser, and not race or language, which makes a nation.<sup>8</sup> A nation is a culturally homogeneous social group which is at once conscious and tenacious of its unity of psychic life and expression;<sup>9</sup> it is "a cultural and spiritual unity and is the highest product of social evolution";<sup>10</sup> it is "a union of men inhabiting the same territory, whether or not subject to the same government, and possessing such common interests of long standing that they may be regarded as belonging to the same race."<sup>11</sup> "That which makes a nation is the consciousness existing at a given time among all the individuals of the same social group, that there is an intimate and profound interdependence between the territory and the population which inhabits it."<sup>12</sup>

<sup>7</sup> "Discours et conférences," 2d ed., p. 277.

<sup>8</sup> "Le principe de nationalités" (1916), p. 7. Compare also LeFur, "Races, nationalités, états" (1922), pp. 22 ff.

<sup>9</sup> Barnes, "Nationalism" in the "Encyclopedia Americana" (1919). See also his "Sociology and Political Theory" (1924), p. 189. Compare also Holcombe, "Foundations of the Modern Commonwealth" (1923), p. 134; Goch, "Nationalism" (1920), pp. 6-9; and Zimmern, "Nationality and Government" (1919), ch. 2. See also stimulating chapter, "The Nation as a Psychological Unit," in Pillsbury, "The Psychology of Nationality and Internationalism" (1916), pp. 21 ff. Gumplowicz ("Allgemeine Staatslehre," pp. 111 ff.) holds that "community of culture" (*Kulturgemeinschaft*) which expresses itself in a common language is the real test of the existence of a nation. This is the outgrowth of a common historic past rather than the result of a common ethnic origin. What made the German, French, Italian, and Spanish peoples each a nation was not a common ethnic origin, for in fact they were not developed from a common stem, but the development of a common language and a common culture."

<sup>10</sup> Novicow, "Les luttes entre sociétés humaines," p. 125 ff.

<sup>11</sup> Littré, "Dictionnaire," def. "Nation."

<sup>12</sup> Duguit, "Souveraineté, et liberté" (1922), p. 33. M. Duguit adds that "common origin (*nationalité*) is not sufficient to constitute a nation. It is necessary that the feeling of interdependence shall have penetrated profoundly the consciousness of all the members of the group, the powerful and the weak, the rich and the poor, the learned and the ignorant, the governed and the governors."

**The Nation Considered as a Political Phenomenon.**—As has been said, the term "nation" as used to-day by most writers connotes a political organization; that is, a nation is not only an association of which the bonds of union are cultural and spiritual, but it is also a politically organized aggregation. In short, it is a state. Consequently the terms "state" and "nation" are frequently used as synonyms. Thus one speaks of the American and British "nations" when "states" are really meant. We have now a new international association officially styled the "League of Nations" when in fact it is a league of "self-governing states, dominions, and colonies." The constitution of the republic of Argentina officially designates the Argentine state as the "Argentine nation." This was the conception of Lord Bryce, who defined a nation as "a nationality which has organized itself into a political body, either independent or desiring to be independent."<sup>13</sup> Similarly, the eminent French jurist Esméain defines the state as "the juridical personification of a nation."<sup>14</sup> Such usage has been criticized as loose and inexact, since a nation is not necessarily a people organized as a state nor is a state necessarily a nation. Thus Scotland is said, correctly or incorrectly, to be a nation, but it is not a state. So Poland and Finland were nations though not states prior to the World War. On the other hand, Austria and Hungary are states, but, before the late war, at least, there was hardly an Austrian or a Hungarian nation, because their heterogeneous peoples were not united by the bonds, other than political, which are essential to make a people a nation.

The limits of the state may extend beyond the boundaries of the nation, considered as an ethnic and linguistic group, and conversely the boundaries of the nation may be wider than those of the state. In fact, they rarely coincide. Thus the territorial limits of the English state (Great Britain) embrace the Scotch, Welsh, and formerly the

<sup>13</sup> *Impressions of South America* (1913), p. 424. Likewise Thomas Hill Green, one of the most profound modern political thinkers, says, "the nation underlies the state" and he in fact defined the state as "the nation organized in a certain way." Compare also Professor J. Holland Rose ("Nationality in Modern History," 1916, p. vi), who conceives a nation to be "a people who have become politically organized."

<sup>14</sup> "Droit constitutionnel" (5th ed., 1909), p. 1. Compare also LeFur, "Races, nationalités, états" (p. 153), who says "the state is the nation juridically organized."

Irish peoples, whereas conversely, the boundaries of the French nation, viewed in its ethnic sense extending beyond those of the French state, reach over into Belgium, Italy, and Switzerland. The modern tendency has been in the direction of identification; that is, the organization of states with boundaries coterminous with those of nations, but the transformation is far from complete.

**The Terms "National" and "Nationality."**—The term "national," as stated above, is used by writers both as a noun and as an adjective. In the former sense it is used in diplomatic correspondence and by writers on international law to denote a person who is entitled to the protection of the state. Ordinarily such a person is a citizen, but he may be an alien, for many states have under their protection classes of persons whom the French call *protégés*, who are not citizens. So the Filipinos are "nationals" of the United States, although they are not citizens of the United States. The term is used adjectively to denote the quality or status of a person or thing who or which possesses the nationality of a given state. Thus we speak of "national" character, "national" honor, "national" property, etc.

The term "nationality" is more difficult to define and various meanings are attributed to it by different writers. Like the word "national," it is used in both an adjectival and a substantive sense. In the first place, it is used to denote the quality or status of a person who is a citizen or of a thing which is impressed with the national character. Thus we speak of the "nationality" of a claimant before a prize court or an arbitral tribunal or the "nationality" of a ship which has been seized. In a substantive sense, the term is employed to designate a group or portion of the population which is united by racial or other bonds. Thus we speak of the Croats, the Serbs, and the Slovenes as each constituting "a nationality" in the new state of Yugoslavia, and of the Slovaks as being "a nationality" in the new Czecho-Slovak state.

**What is a Nationality?**—The terms "nation" and "nationality," as stated above, have frequently been and still are used as synonyms, and those who have distinguished between them have by no means been in agreement as to the difference. Lord Bryce suggested that it might not be wide of the mark to say that while "a nationality is a population held together by certain ties, as, for example,

language and literature, ideas, customs, and traditions, in such wise so to feel itself a coherent unity distinct from other populations similarly held together by like ties of their own, a *nation* is a nationality which has organized itself into a political body either independent or desiring to be independent."<sup>15</sup> According to him the difference is one of political organization; in short, the two things are identical except that the one is politically organized and has become an independent state or desires to become such, whereas the other is not so organized. Bryce's conception did not differ materially from that of John Stuart Mill, who said: "A portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and any others— which make them cooperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively."<sup>16</sup>

Some writers, on the other hand, do not consider the difference between a "nation" and a "nationality" to be merely a matter of political organization, but rather a difference of numbers. Accordingly, they define a "nationality" as being usually a distinct socio-ethnic group within the state and ordinarily constituting a minority of the total population.<sup>17</sup> Thus the Scotch and Welsh in Great Britain constitute "nationalities," as do the Dutch in the South African Union, the French in Canada, the Slovenes in Yugoslavia, the Slovaks in Czechoslovakia, formerly the Poles in Germany and Austria, and many others. It would be excessive flattery to their pride to call them

<sup>15</sup> "South America," p. 424. In the same sense Laveleye in his "Gouvernement dans la démocratie" (bk. II, ch. 3) distinguished between a nation and a nationality. "A nation," he said, "is a group of men united under the same sovereignty, while a nationality is a group of men united by identity of origin, race, language, or by community of traditions, history, and interests." Compare also Rose (*op. cit.*, p. vi), who considers "a nationality" (in the concrete sense) to be "a people which has not yet become organized politically." In an ideal sense, he said, it is "an aspiration towards united national existence." See also Hayes, "Essays on Nationalism" (1926), p. 5, who defines a *nationality* as "a group of people who speak either the same language or closely related dialects, who cherish common historical traditions and thus constitute or think they constitute, a distinct cultural society. A nationality by acquiring political unity and sovereign independence becomes a 'nation,' or, to avoid the use of the troublesome word 'nation,' establishes a 'national state.'"

<sup>16</sup> "Representative Government," ch. 16.

<sup>17</sup> Compare Burgess, *op. cit.*, vol. I, p. 5, and Gumplowicz, *op. cit.*, p. 124.

"nations"; the term "nationality" more nearly corresponds to their importance.

**The Essential Elements of Nationality: (1) Purity of Race.—**

Having defined in a general way the term "nationality," let us now inquire what are the essential or usual elements which constitute a group of people a nationality. Community of race and community of language are undoubtedly the most important of these elements, but it is necessary to recognize that neither is absolutely essential. The science of ethnology has revealed the difficulty of drawing the lines which separate one race from another, since many existing races are mixed in character, that is, they have no common origin, but have been formed by a fusion of various races. It may well be doubted whether there are to-day any pure races in Europe, in the physical sense that they are not a compound of other races. Real race distinctions of skull, stature, hair, complexion, etc., so far as they are traceable with any definiteness, cut directly across the existing nationalities.<sup>18</sup> Race is a physical phenomenon, whereas nationality is a complex phenomenon into which spiritual elements enter. To identify race and nation is, as has been well said, to subordinate moral conscience to organic life and to make the animalism which is in man the whole of humanity.<sup>19</sup> If purity of race in this sense were insisted upon as essential, some of the most distinct nationalities to-day would not be able to make good their claim.<sup>20</sup> Some of the most highly civilized races of the world (the English and French, for example) have in fact been formed by a fusion of other races. It is enough perhaps that there be a *belief* in a common origin or that the people have forgotten the diversity of their origins and that there is no longer a sharp cleavage between them. If the races are fairly well merged and there

<sup>18</sup>Buck, "Language and Sentiment of Nationality," *Amer. Pol. Sci. Rev.* vol. X (1916), p. 46. See also LeFur, "Races, nationalités, états," who pronounces the "doctrine of race" as the basis of nationality to be unscientific and a "pure ideological speculation" (p. 391). See also Lecky, "Democracy and Liberty," vol. I, p. 5; Caenazza-Amari, "Droit int. pub." vol. I, pt. I, ch. 2; Fiore, "Droit int. pub.", vol. I, pt. I, ch. 1; Mancini, "De la nationalité comme fondement du droit des gens"; and Nys, "Droit international," vol. I, sec. 2, ch. 2.

<sup>19</sup>Goblet, "Le principe des nationalités," *Révue philosophique*, vol. I (1916), p. 502.

<sup>20</sup>Compare Gilchrist, *op. cit.*, p. 35. Also LeFur, *op. cit.*, pp. 22 ff. and Giraud, "Le droit des nationalités d'aujourd'hui et le droit int. public" (1924), p. 31.

is free intercourse between them, the differences of origin are not important. If, however, one of the races claims superiority, intellectually and culturally, over the others, the development of a sentiment of nationality among them will be difficult. It was this feeling of superiority and the spirit of domination on the part of the Magyars which prevented the development of a sense of nationality among the various races of Hungary ; and the rigid caste system of India has had somewhat the same result in that country.<sup>21</sup>

**(2) Community of Language.**—Community of language, however, is usually regarded as an essential element, as stated above, since language supplies the medium through which the people maintain intercourse with one another and through which they can express their culture and ideals in a common literature. The lack of this medium separates people somewhat as the barriers of mountains and seas formerly did, prevents them from knowing and understanding one another, and thus renders difficult the development of the common consciousness and the community of ideals which are necessary to constitute real nationality. But here again it must be admitted that that community of language is not absolutely essential. Thus the Scots constitute a nationality, if not a nation, though some of them speak Gaelic and some English ; likewise the Belgians and Swiss are nations, although both are divided linguistically, the former speaking two languages and the latter three. The inhabitants of Switzerland do not think of themselves as French, German, or Italian, but as Swiss. They have developed in the course of centuries a common sentiment of nationality in spite of their differences of language. Nevertheless, community of language is a most important factor, more important in fact than community of race, in molding a people into a nationality, and of all the factors which go to make up nationality it is the one of which a people is most conscious and the one to which they are the most tenaciously attached. Some of the most bitter struggles which modern Europe has known have been those for the preservation of the rights of language against suppression.

**(3) Geographic Unity.**—Geographic unity is another characteristic which is usually attributed to a nationality. That is to say, the population constituting the nationality must occupy a fixed territory,

<sup>21</sup> Compare Muir, "Nationalism and Internationalism" (1917), pp. 39 ff.

the parts of which are contiguous. In fact, however, examples of nationalities composed of peoples distributed or scattered over territories which were non-contiguous and which belonged to different states have not been lacking. Thus the Poles and the Yugo-Slavs prior to the World War constituted nationalities (if not nations), but they were separated and formed parts of different states. So the Jews are still said to constitute a nationality, although they were long since dispersed and are scattered to-day over many parts of the world. Now that provision has been made for a national home for them in Palestine, if it is availed of, a center will be created from which will radiate influences which will strengthen the somewhat moribund sense of Hebrew nationality.

**(4) Community of Religion.**—Community of religion was once regarded as a mark of nationality and in earlier times it played an important part in the process of national consolidation. Thus it has been said that the national character of the Scots is probably due more to the work of John Knox than to any other single cause,<sup>22</sup> and that it was in part the determination to maintain Protestantism that enabled the English to resist Spain at the time of the defeat of the Armada.<sup>23</sup> To-day, however, the element of religious unity is no longer regarded as essential. We have seen recent examples of nationalities professing different religions, but who, nevertheless, have been brought together into a single state : for example, the Serbs, who are Greek Catholics, and the Croats, who are Roman Catholics, but who have lately united with each other and with the Slovenes to form the Yugoslav state. It may be observed, however, that the Serbs and Croats speak the same language and have in the main common traditions and a similar culture. These bonds have, therefore, proved stronger than the separatist influence of religious differences. Examples of the disruption of states formed by the union of peoples divided by differences of religion are, however, by no means lacking. It was in part, at least, this element of disunity which led to the separation in 1831 of Belgium and Holland, which had been united by the Vienna Congress in 1815 into a single state. As is well known, it was religious differences between Protestants and Catholics which for a long

<sup>22</sup> Muir, "Nationalism and Internationalism" (1917), p. 44.

<sup>23</sup> Gilchrist, *op. cit.*, p. 37.

time constituted the principal obstacle to the progress of the nationalist movement in Ireland. And it is the cleavage between the religions of the Hindus and the Mohammedans in India that retards in large measure the progress of the nationalist movement in that country to-day. Similarly, the mutual antipathies between Christians and Moslems in the Ottoman Empire prevented the realization of any highly developed sense of nationality in that state. On the other hand, the populations of many strongly consolidated nations to-day are sharply divided religiously. Thus Germany is divided between Catholics and Protestants; Switzerland is partly Catholic and partly Protestant, and England has never known religious unity since the Reformation. It may be concluded, therefore, that while community of religion has in some cases been a powerful factor in the development of nationality and in the strengthening of the bonds of national unity, and while in other cases the absence of it has contributed to the disruption of states, it is no longer, thanks to the modern spirit of religious toleration, an essential or important element of determining nationality.

**(5) Common Political Aspirations.**—Another characteristic of most nationalities is that they aspire either to independence or to a large autonomy in the matter of government; that is, they desire to become nations, in the sense in which the term is now popularly understood, that is, a state. As LeFur remarks, a nationality is before all a state *en germe*.<sup>24</sup> "A nationality," said Durkheim, "is a group of which the members . . . wish to live under the same laws and form a state." Independent political union is the natural fruit of nationality where the population is sufficiently numerous and capable of maintaining a separate state existence, and conversely political union has sometimes been the means of creating a genuine nationality out of heterogeneous race elements, as, for example, in Switzerland. As is well known, delegations representing many nationalities appeared at the peace conference at Paris in 1917, invoking the principle of "self-determination" and demanding that they be allowed to separate from the states of which they were a part and to organize themselves into new and independent states. They proceeded on the theory that it is a sort of natural right of every people who form a nationality

<sup>24</sup> *Op. cit.*, p. 153.

to determine for themselves their own destiny and consequently to free themselves from the subjection of other states to which they happen to be unwillingly yoked.

**(6) Other Contributing Factors.**—It is now generally admitted that while all of the above-mentioned factors are or have been important contributing forces in the development of nationality, no one of them is absolutely essential.<sup>25</sup> More and more, in recent years, it has come to be recognized that it is not so much community of race, language, religion, or residence which impresses a people with the character of nationality, as it is the feeling of community of interests and ideals, of "like-mindedness," as the sociologists say,—the mutual sympathy which comes from the consciousness of wrongs and oppression suffered through common subjection during a long period of time to a despotic government, the pride of a common share in great historic struggles, and the possession of a common heritage and common traditions expressed in song and legend. Thus the memories of Bannockburn, Flodden Field, and Culloden contributed powerfully to the development of a sense of nationality among the Scots. Similarly the memories of the long struggle of the Swiss for freedom in their mountain abode, and their pride in the memories and legends of William Tell, Winkelried, and other heroes; the pride of the Serbs in the memory of Stephen Dushan and Kossova, and of the centuries of slavery which they endured; the memory by the Germans of the oppression of Napoleon and the flame of patriotism which it kindled in the days of 1813; and that of the Irish of what they regarded as unjust subjection and oppression on the part of the English, had a like effect in their countries. It is this feeling of unforgetfulness of historical events which contributes to make the Jews still a nationality although they are widely dispersed. The feeling was expressed by the psalmist when he said, "When I forget thee, O Jerusalem, let my

<sup>25</sup> Mill ("Rep. Govt.", ch. 16), referring to the causes which generate the feeling of nationality, said: "Sometimes it is the effect of identity of race and descent. Community of language and community of religion greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents: the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are either indispensable, or necessarily sufficient by themselves." He added, however, that "in general, the national feeling is proportionately weakened by the failure of any of the causes which contribute to it."

right hand forget its cunning." It was the power of common memories of this kind to which President Lincoln appealed in his first inaugural address when he asserted that the people of the North and of the South were not enemies but friends, that the "bonds of affection" between them could not be broken, and that they could not separate. "The mystic chords of memory," he said, "stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."

**Conclusion.**—The truth is, this thing which we call nationality and which is so difficult to define, is in essence largely a matter of sentiment. If a people have acquired the character of a nationality, it is because they believe they have a consciousness of being bound together by strong ties and affinities, which distinguish them from their neighbors. They have a feeling of common interests and of ideals, their moral ideas are fundamentally the same, they have a common heritage of tradition and of memories of common sacrifice and suffering, or of achievement and glory, and they share a common pride in great personalities and heroes. As a well-known writer on the subject has aptly remarked : "nationality, like religion, is subjective ; statehood is objective ; nationality is psychological ; statehood is political ; nationality is a condition of mind ; statehood is a condition in law ; nationality is a spiritual possession ; statehood is an enforceable obligation ; nationality is a way of feeling, thinking, and living ; statehood is a condition inseparable from all civilized ways of living."<sup>26</sup> Again it has been well said that "contrary to a popular impression that nationality is something fixed and capable of exact definition, it has come to be recognized that it is rather a product of historical development, and that all attempts to formulate a series of universally applicable prerequisites break down. Nationality is essentially subjective, an active sentiment of unity within a fairly extensive group, a sentiment based upon real but diverse factors, political, geographical, physical, and social, any or all of which may be present in this or that case, but no one of which must be present in all cases."<sup>27</sup>

<sup>26</sup> Zimmern, *op. cit.*, p. 51.

<sup>27</sup> Buck, "Language and the Sentiment of Nationality," *Amer. Pol. Sci. Rev.*, vol. X (1916), p. 45. For the view that nationality is a matter of sentiment and

It is believed that no better or more concise statement of the nature and elements of nationality has been made.<sup>28</sup>

## II. DEVELOPMENT OF THE PRINCIPLE OF NATIONALISM

**Origin of the Principle.**—The political principle, and in large measure, even the sentiment, of nationality hardly existed during the Middle Ages. They are, in the main, a development of the eighteenth and nineteenth centuries, although the idea may be traced back to the fourteenth century. As Lord Acton remarked, the rights of nationalities in the old European system "were neither recognized by governments nor asserted by the people."<sup>29</sup> It was dynastic interests or ambitions rather than those of nationalities which determined the boundaries of states and the policies of rulers, and the feeling of nationality was so imperfectly developed and so lacking in sensitiveness that measures which to-day would be regarded as grave infringements upon the rights of nationalities, and which would provoke resistance, were acquiesced in without protest.

In the sixteenth century when Machiavelli, who is sometimes called the first great modern nationalist, endeavored to kindle the flame of nationalism among the Italian people, Italy was, in the later language of Metternich, a mere "geographical expression" and the people thought of themselves not as Italians but as Florentines,

feeling, a "corporate self-consciousness" and a spiritual possession, see also Muir, *op. cit.*, ch. 2; Gilchrist, *op. cit.*, p. 39; Holcombe, *op. cit.*, p. 133; Gooch, *op. cit.*, p. 68; Burns "Political Ideals," ch. 8; and Pillsbury, *op. cit.*, chs. 1-2, who remarks that "nationality is first of all a psychological and sociological problem" and that "only indirectly can it be determined by anthropometry or even by history" (p. 20).

<sup>28</sup> Compare Gilchrist (*op. cit.*, p. 31: also his "Indian Nationality," 1920, p. 7). Compare also Muir (*op. cit.*, p. 38), who says a nation (he is using the term as synonymous with "nationality") "may be provisionally defined as a body of people who feel themselves to be naturally linked together by certain affinities which are so strong and real for them that they can live happily together, are dissatisfied when disunited, and cannot tolerate subjection to peoples who do not share these ties." Rose ("Nationality in History," p. 147) remarks that nationality is "an instinct and cannot be exactly defined; it is the apotheosis of family feeling . . . it is a union of hearts, once made, never unmade—it is a spiritual conception, unconquerable, indestructible. So soon as clans, tribes, or provinces catch the glow of this wider enthusiasm they form a nation."

<sup>29</sup> "History of Freedom and Other Essays" (1919), p. 273.

Tuscans, Venetians, Genoese, Pisans, etc. What is now Germany was a patchwork of some 300 petty states, each of which endeavored to keep up the appearance of national states, and as late as 1845 Bismarck declared that the German people thought of themselves as Prussians, Bavarians, Hanoverians, etc., rather than as Germans.

**Factors Contributing to the Development of Nationalism ; the Partition of Poland.**—In the meantime, however, the sense of nationality or nationalism was developing in certain countries and everywhere forces were gathering which were to create it ultimately in other countries. England was the first country in which the feeling of nationalism was strongly developed and it was the first "to attain the full stature of organized and conscious nationhood."<sup>20</sup> The English attempt to dominate France roused a passionate spirit of nationalism in that country in the early fifteenth century, which found its embodiment in the sanctification of Joan of Arc. Likewise in Spain and Portugal the national spirit was kindled by various causes and at the opening of the modern age these two countries emerged as fully consolidated national states. The sixteenth century also saw the Danish and Swedish peoples organized as national states. But throughout central and southeastern Europe, a region which was inhabited by many races and peoples, and in which the problem of national consolidation was far more difficult, the nationalistic movement had hardly made its appearance. As has been said, however, causes were at work which were soon to bring it into existence and to give it vitality. The influence of education and general enlightenment, together with the development of political consciousness and love of liberty, were not the least of these.

In the latter part of the eighteenth century came the partition of Poland—an act by which the territory and people of a whole nation were brutally divided among the rulers of Austria, Prussia, and Russia. Poland happened to be an elective monarchy and was therefore a sort of outcast among the absolute monarchies of that age; she was a menace to the sacrosanct principle of hereditary right and had to be removed. "A monarchy without royal blood, a crown bestowed by the nation," as Lord Acton characterized it, "were an anomaly and an outrage in that age of dynastic absolutism. The country was excluded

<sup>20</sup> Muir, "Nationalism and Internationalism" (1917), p. 67.

from the European system by the nature of its institutions. It excited a cupidity which could not be satisfied. It gave the reigning families of Europe no hope of permanently strengthening themselves by inter-marriage with its rulers, or of obtaining it by bequest or by inheritance."<sup>31</sup> The partition of Poland was a wanton act of violence committed in open defiance not only of the rights of an unoffending people but also of one of the oldest principles of international law.<sup>32</sup> As Lord Acton justly remarked, this "most revolutionary act of the old absolutism awakened the theory of nationality in Europe." The poles were divided among the aggressors, but they remained a nation, if not a state, and the flame which the partition had kindled was destined never to be extinguished. Thenceforward they were a nation demanding that their political existence should be restored; they were "as a soul wandering in search of a body in which to begin life over again," and their demand for justice found defenders the world over, for, as Burke remarked, "no wise or honest man could approve of that partition."

#### **Effect of the French Revolution and the Napoleonic Conquests.**

—Shortly after the first partition of Poland came the French Revolution, followed by the subjection of a large part of Europe to the domination of Napoleon, the effect of which was to cause a vigorous revival of the national spirit in the countries brought under his control. The Revolutionists did not, strictly speaking, show much respect for the historical forces and factors which had brought about the national consolidation of France.<sup>33</sup> Nor was anything regarding the rights of nationalities expressly proclaimed in their Declaration of the Rights of Man. Nevertheless, it may be argued that the rights of man include the right of self-determination of peoples and it follows as a natural corollary that the affirmation of the former carried with it the latter. But the imperialism of the Revolutionists in forcibly annexing foreign peoples to France disregarded the rights of nations and nationalities as completely

<sup>31</sup> "History of Freedom and Other Essays," p. 275.

<sup>32</sup> Muir, *op. cit.*, p. 68, characterizes the partition as "the most monstrous and unpardonable of all outrages on the national idea" and adds that "it is impossible to find words with which adequately to characterize the methods by which this iniquity was carried through."

<sup>33</sup> Compare Acton, *op. cit.*, p. 278.

as the old absolute monarchs had done.<sup>34</sup> Napoleon recognized the power of national sentiment and relied upon it, not without success, in the political readjustments which he made in some of the countries brought under his domination; but in others, notably Russia, Germany, Italy, and Spain, his policy soon provoked popular and spontaneous resistance.<sup>35</sup> In all these countries the spirit of nationalism was aroused and it was fanned into a flame by political leaders, orators and poets. Kent, Hegel, Schiller, and Goethe provided the ideals, while the successful statesmanship of Stein, following the period of subjection, stirred the spirit of the people.<sup>36</sup> Speaking of this awakening of the feeling of nationality, Professor J. Holland Rose<sup>37</sup> remarks that "in this new and intense life she [nationality] exerted a singular fascination on all peoples. Thinkers felt her magnetic potency. Goethe, irresponsible to German politics, bowed before the manifestations of her uncanny strength at Valmy. Schiller and Fichte hailed her as the source of light and warmth to a dead world. Wordsworth and Coleridge first felt the full thrill of poetic ecstasy as they gazed on her civic raptures, and foretold defeat to all who withstood her new-found might. That was nationality in its purest form. It corresponds to the time in life when the youth finds himself."

**The Results of the Vienna Congress.**—Ultimately Napoleon was defeated by the uprising which was caused by the awakening of the national spirit. Unfortunately the Vienna Congress largely ignored it in its reconstruction of Europe. New states were formed, existing

<sup>34</sup> The Revolutionists began by denying any intention of conquest or violation of the independence of other peoples. Plebiscites were held in certain territories annexed to France—Avignon, Savoy, the Rhineland, and others—and the votes in favor of annexation afforded a pretext for new conquests. As LeFur remarks (*Rev. de droit int.*, 1921, p. 205), they began by affirming the absolute right of peoples to determine their own destiny by a free vote, then their adhesion was solicited and finally it was imposed upon them, so that the plebiscite, so satisfying at first and so respectful of the liberty of peoples, in reality amounted to little. As to these plebiscites see Johannet, "Le principe des nationalités," chs. 5, 7.

<sup>35</sup> Laveleye ("Le gouvernement dans la démocratie," p. 53) quotes Napoleon as saying, "the government which first raises the flag of nationality and becomes its defender will dominate Europe." After his fall, while imprisoned in St. Helena, he asserted that his aim had been to reorganize Europe along national lines and he prophesied that Europe would never have peace and stability until that was done. Muir, *op. cit.*, p. 75. <sup>36</sup> Compare Pillsbury, *op. cit.*, p. 122.

<sup>37</sup> "Nationality in Modern History" (1916), p. 144.

states were yoked together, and others were divided in flagrant disregard of the rights of nationalities. Italy became once more a "geographical expression" and Germany was erected into a confederation of 39 states. The Holy Alliance, which now came into existence, endeavored to repress manifestations of the national spirit as they occurred and to suppress revolutionary movements which the rising tide of nationalism now excited.

Nationalism now took the form of a political principle or doctrine, that is, it became the basis of a theory that every people who constitute a nationality have a right to be independent and to organize themselves as a separate state of their own creation.<sup>38</sup> Exiles from Italy, Poland, Hungary, Germany, and other lands, who had found asylum in England, Belgium, France, and Switzerland, organized and conducted a propaganda for the national freedom of the peoples for whom they spoke. The Italian Mazzini, the eloquent and fiery "prophet of nationalism," was the most noted of them. Revolutionary uprisings soon occurred in Italy, Poland, and Greece. The Greek revolt against the Turks attracted the sympathy of men everywhere in Christian Europe and even in far-away America, and eventually the powers were moved to intervene on behalf of the Greeks, who obtained their independence in 1827. The Belgians rose against the Dutch, with whom they had been unwillingly united by the Vienna Congress, and in 1831 they also became independent.

The year 1848 saw revolutions which in the main were nationalistic in character, in Italy, Germany, and Hungary, but while the revolutionists were temporarily successful, no permanent results were achieved. The spirit of nationalism, however, could not be permanently suppressed, and the generation which participated in the movement of 1848 saw the unification of Italy and Germany. Not many years later the Balkan peoples who remained under the Turkish yoke revolted and by the treaty of Berlin (1878) the independence of Serbia, Montenegro, and Rumania was recognized. While Bulgaria was then left under the suzerainty of the Ottoman Empire, her complete emancipation soon followed.

<sup>38</sup> Compare Burns, "Political Ideals," p. 186. The late Lord Morley ("History and Politics," p. 72) thus described the evolution of the doctrine of nationality: "From instinct, it became idea; from idea, abstract form; then, fervid preposition, ending where it is to-day, a dogma."

**The Results of the World War.**—During the years which elapsed between 1878 and the treaties of peace at the end of the World War, nationalistic aspirations were kept alive and in some cases took the form of organized movements in many parts of Europe and elsewhere, notably among the Irish, the Finns, the Magyars, the Czechs, the Slovaks, the Croats, the Albanians, the Poles, the Ruthenians, various Baltic races, the Egyptians, the Indians, and others. To some of them the World War, which was often asserted to be a war in defense of the rights of oppressed nationalities brought a realization of their dreams and aspirations. Alsace-Lorraine was restored to France, Poland was recognized as an independent state with boundaries corresponding in the main to her ethnic boundaries, and northern Schleswig was returned to Denmark. The Czechs and Slovaks were emancipated from Austrian rule and united in a state of their own creation. The Southern Slavs—Serbs, Croats, and Slovenes—were likewise freed from Austrian and Hungarian rule and organized in the Yugo-Slav state. The Finns, Estonians, Letts, and Lithuanians became independent of Russia, each forming a separate state. The Albanians also made good their claim to independence and were organized in a separate state. Finally, since the war, the independence of Ireland and Egypt has been recognized by Great Britain, subject to certain reservations by which British control over them is maintained in respect chiefly to their foreign relations. So Syria, Mesopotamia, Palestine, and Hejaz were emancipated from Turkish rule and recognized as partly independent states.

**Departures from the Principle of Nationality.**—The reorganization and adjustments made by the treaties of peace, however, in spite of President Wilson's declaration that "all well-defined national aspirations should be accorded the utmost possible satisfaction," did not wholly respect the rights of nationalities. Large numbers of Germans were left under Polish, Czecho-Slovak, and Italian rule, and Hungarian peoples were detached from Hungary and annexed to other states. Large numbers of Lithuanians and Ruthenians were assigned to Poland and Czechoslovakia; numerous Austrians, Albanians, and Bulgarians were given to Yugoslavia, and important groups of Hungarians, Bulgarians, and Ruthenians were given to Rumania. So, in the territory added to Greece, the Turks, Bulgarians, and Albanians out-

numbered the Greeks. Bessarabia was detached from Russia and Transylvania from Hungary and annexed to Rumania.<sup>39</sup> Austria, reduced to about one sixth of her former area, was forbidden to unite with Germany, although the Austrian population is mainly German, ethnically speaking.

This situation is not entirely satisfactory, since it laid the foundation for further "irredentist" movements which may yet give rise to serious troubles. The dissatisfaction is especially strong among the Germans and Hungarians, who demand a revision of the boundary provisions by which large numbers of their people were detached and handed over to foreign states.<sup>40</sup>

In drawing the boundary lines of the new states, the Peace Conference found it impossible to draw them in such a way as to include in each state only those of the same nationality, because of the hopeless intermixture in some cases of the peoples of different nationalities in the same territories. There were also economic, political, and strategic factors which sometimes made respect for the principle of nationality difficult or impossible. In these circumstances, the victors did what had often been done before; they favored themselves and their protégés. Thus, Italy was given South Tyrol, although the population was almost entirely German; Czechoslovakia was given the mines of Teschen, although the population was predominantly German; Yugoslavia was given a large part of Macedonia, inhabited in large part by Bulgarians; etc.

**Plebiscites ; Unsolved Problems of Nationality.**—The treaties of peace provided for plebiscites in some of the territories transferred from one state to another--there were nine all together--but none

<sup>39</sup> Rumania claims that about seventy per cent of the population of Bessarabia is Rumanian, but this estimate is believed to be a considerable exaggeration. *Foreign Affairs*, vol. II (1924), p. 664.

<sup>40</sup> Compare Coolidge, "Dissatisfied Germany," *Foreign Affairs*, vol. IV (1925), pp. 35 ff. The solutions reached in some cases have not escaped the criticism even of French writers. Thus Professor Giraud of the University of Rennes, referring to the millions of Germans who were annexed to Czechoslovakia, expresses the opinion that while it was not possible to detach a considerable number of them and assign them to Germany because of their scattered character, the majority of them, occupying as they did a compact territory, could have and should have been annexed to Germany. He concludes that the situation can be regarded only as provisional and will have to be altered sooner or later. *Rev. gén. de droit int. pub.*, 1924, p. 68.

were allowed in the case of the Germans who were annexed to France and Czechoslovakia, of the German-Austrians who were annexed to Italy, and of the peoples of Hungary who were annexed to other states.<sup>41</sup> The German delegation at the Peace Conference protested against the denials of a plebiscite in the transferred territories inhabited mainly by Germans, and they invoked the doctrine of self-determination as proclaimed by President Wilson, notably in his address to Congress of February 11, 1918; when he said: "Peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were chattels and pawns in a game--peoples may now be dominated and governed only by their own consent." But they were told that Germany had denied the same right to the French of Alsace-Lorraine in 1871; that the German populations concerned had not asked for a plebiscite; and that plebiscites had in fact been provided for in all territories where there was doubt "as to the wishes of the inhabitants," a statement which was hardly in accord with the facts.

In other respects the problem of nationalism remains unsolved. The Slovaks waived their claim to a separate national existence and consented to merge their destiny with that of the Czechs, but they are not entirely satisfied with the situation and are complaining to-day that they are dominated and controlled by their more numerous and powerful partners, the Czechs. Similarly, the Croats, Serbs, and Slovenes consented, not altogether willingly in the case of the Slovenes, to unite their destinies in a single state, but the Croats, like the Slovaks, are dissatisfied, and are demanding a wide autonomy.<sup>42</sup> Their situation in the new state to-day is somewhat analogous to that of the Catholic Irish formerly in the United Kingdom of Great Britain and Ireland. The Flemish population in Belgium, while not demanding independence, has carried on an organized movement for recognition of their language rights, which recently assumed the paramount place in the internal politics of the country. The Ruthenians in Czechoslovakia

<sup>41</sup> As to these plebiscites and as to the practice of the past, see my "Recent Developments in International Law" (1925), pp. 403 ff., where numerous sources and authorities are cited; and Buell, "International Relations" (1925), pp. 37 ff., where the value and the weakness of plebiscites as a method of self-determination are considered.

<sup>42</sup> See Armstrong "The New Balkans," in *Foreign Affairs*, vol. III (1924), pp. 296 ff., and "Jugo-Slavia Today," *ibid.*, June, 1923, pp. 82 ff.

are complaining that their promised autonomy has not been fully granted ; and in due course it may be expected that the Saxons of Transylvania, the inhabitants of the Aland Islands, and the Germans of Memel (in Lithuania) will make similar complaints. Finally, the fire of nationalism continues to burn with increasing flame in India. If the principle of nationalism means self-determination, various parts of the world are destined still to be disturbed by nationalistic movements.

## CHAPTER VII

### STATE, NATION, AND NATIONALITY (*Continued*) : THE RIGHTS OF NATIONALITIES

#### Selected References

- BLINTCHILI, "Theory of the State," bk. II, ch. 3.  
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RATNER, "The Treaties for the Protection of Minorities by the League of Nations," *Amer. Jour. of Internat. Law*, vol. XVII (1923), pp. 641-661.  
TIPPERLEY, "History of the Peace Conference at Paris," vol. V, ch. 2.

**Right of Self-Determination.**—As stated in the preceding chapter, it is one of the characteristic features of modern nationalism that most peoples who constitute a nationality aspire either to be independent and to live under a state organization of their own choice and creation, or at least to be accorded a large political autonomy, where they are united with another nationality or nationalities in the same state.<sup>1</sup> Toward the middle of the nineteenth century the principle came to be asserted that every such people have a sort of natural right to determine their own political destiny. States composed of different nationalities came to be regarded as unnatural unions, and peoples who were unwilling partners in such unions had therefore a right to dissolve the partnership by withdrawal and to establish new

<sup>1</sup> There are, of course, exceptions; for example, the Scots and the Welsh in Great Britain and the French, Germans, and Italians in Switzerland, all of whom are quite content to remain as they are without a separate political organization. Scotland in fact was once a state and voluntarily surrendered her national existence to join herself with England. Other examples of the kind are not lacking.

states on national foundations. As pointed out above, this is what has actually happened in a large number of instances in Europe. President Wilson in various addresses during the World War defined the right of self-determination without qualification. "Self-determination," he said, "is not a mere phrase; it is an imperative principle of action, which statesmen will henceforth ignore at their peril." Carried to its logical limits the theory may be formulated as follows: "Every nationality a state." Can such a right be defended, and if so, would the actual exercise of it be desirable? As Lord Curzon remarked at the Lausanne Peace Conference (1923), the right of self-determination is like a two-edged sword and can be admitted only with reservation. It is and has been in the past a unifying force, but it may be, and has recently become, also a disintegrating force. Manifestly, if the theory were actually applied in all cases, it would lead to the disruption of some of the oldest existing states of the world. It would mean the separation of Scotland, Wales, and perhaps South Africa and French Canada from the British Empire and the establishment of four new states within the present limits of the Empire; it would mean the division of Belgium into two states, one Walloon and the other Flemish; of Switzerland into three states, and so on. If pushed still further, it would give the Bretons in France, the Catalans in Spain, the province of Vorarlberg in Austria, Yucatan in Mexico, the German, Norwegian, and Italian portions of the United States and the Italian districts of Argentine, their political independence. It would allow the Dalmatian cities on the Adriatic coast to separate themselves from the hinterland.<sup>2</sup> If it is true, as President Masaryk asserted in his pamphlet on "Small Nations in the European Crisis," that there are 68 distinct nationalities in Europe, Europe would come to be divided into 68 states instead of 28, were the principle "every nationality a state" carried out in practice. It is hardly conceivable that such a multiplication of petty states would be an advantage either for themselves or for the general peace and welfare.

**Limitations of the Right of Self-Determination.**—Manifestly, there are limits beyond which the doctrine of self-determination as applied to nationalities cannot be admitted. If the right of every group, however small, which may happen to be ethnically and linguisti-

<sup>2</sup> Compare LeFur, "Nationalités, races, et états," *Rev. de droit int. et de l'int. comparée*, 1921, p. 198, and Buell, "International Relations" (1925), p. 45.

cally distinct from the rest of the population, to separate and organize itself into a new state, were admitted and exercised in practice, it would lead to chaos and anarchy. In 1920 a committee of eminent jurists was appointed by the Council of the League of Nations to give an advisory opinion as to the right of the people of the Aland Islands to separate from Finland and unite with Sweden. By plebiscites held in 1918 and again in 1919 they had voted almost unanimously in favor of separation. The committee of jurists in its opinion stated that there was no rule of positive international law which recognized the right of fractions of peoples as such to separate themselves by a simple act of their own will from a definitively established state of which they form a part, any more than it recognizes the rights of other states to demand such separation. "Generally speaking," it said, "the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is exclusively an attribute of the sovereignty of any state which is definitively constituted." It added that the recognition of the right of self-determination in the form asserted by the inhabitants of the Aland Islands would amount to an infringement upon the sovereignty of existing states, would lead to destruction of the stability which the very word "state" implies, and would endanger the interests of the international community.<sup>3</sup>

**Mill's Doctrine of the Nation-State.**—The saying of John Stuart Mill has often been quoted that "It is in general a necessary condition of free institutions, that the boundaries of governments should coincide in the main with those of nationalities."<sup>4</sup> Mill admitted that this view represented an ideal, since, for geographical reasons, it could not always be realized in fact, for the reason that it often happens that different nationalities are so intermingled as to make it impracticable to organize each into a separate state. This is true, for example, of the Germans in Poland and Czechoslovakia. In places they constitute "islands," as it were, in a sea of Poles and Czechs.

<sup>3</sup> Text of the opinion in the *Journal officiel* of the League of Nations, Spec. Supp. No. 3, 1920, pp. 3 ff. See also the observations of the Finnish Minister on the opinion of the committee, *Journal officiel*, Jan. Feb., 1921, pp. 66 ff., and two articles by F. de Visscher, "La question des îles d'Aaland," *Revue de droit international*, 1921, pp. 35 ff. and 243 ff.

<sup>4</sup> *Representative Government*, ch. 16.

The Turks in Yugoslavia and Rumania and the Saxons in Rumania are in somewhat the same situation. Apparently Mill's ideal was that of a world parcelled out among a multitude of states, for the most part petty in area and not self-sufficing in resources. It is an ideal which now has few supporters.<sup>5</sup> Mill further said : "Where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality under the same government and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed. One hardly knows what any division of the human race should be free to do, if not to determine with which of the various collective bodies of human beings they choose to associate themselves." This is equivalent to saying that the people who constitute a nationality have the undoubted right of self-determination, the right to decide for themselves with whom they shall be politically associated. From this it follows as a corollary that they have a right to separate from those with whom they are politically united and to establish new connections or to organize themselves in a new state. We can only repeat that such a right, while it may be admitted as a general principle, is one which is subject to limitations which cannot be passed without breaking up into fragments many long-established states. Mill expressed a third opinion which has also been contested, namely, that "Free institutions are next to impossible in a country made up of different nationalities." "Among a people without fellow feeling," he added, "especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist." The history of Switzerland, however, affords a striking refutation of the truth of this proposition. The population of this country consists of three distinct nationalities, French, Germans, and Italians,—not to mention the small Romansch-speaking element—who have lived together peaceably for a long time and without disruptive tendencies. It would manifestly be contrary to the truth to say that "free institutions" do not exist in Switzerland or that representative government does not work successfully there because of the lack of a united public opinion. So in Belgium, where the population is divided between two different races who read and speak different languages, free institutions and representative government exist in a highly

<sup>5</sup> Compare Zimmern, "Nationality and Government" (1919), p. 64.

developed degree. It is true that dissension regarding the language question has not been lacking, but it has never been sufficiently serious to threaten the disruption of the state. Finally, the United States furnishes an example of a state composed of a mixture of many races, whole regions of which are inhabited by peoples of foreign races who still speak, in large measure, their native languages. Yet the system of representative government here has worked with greater success — perhaps than in many states having an ethnically homogeneous population, and certainly it would be hard to deny that "free institutions" exist in a high degree.

**Criticism of the Doctrine of the "Mono-National" State.—**

The theory of the "mono-national" state, that is, the state whose political boundaries coincide with those of a single nationality, has been attacked by many writers. Thus Gumplowicz asserted that there

no historical or sociological justification for the view that such a state necessarily possesses elements of strength which are lacking in those composed of number of distinct nationalities. On the contrary, he maintained that there is often a larger degree of popular freedom in "poly-national" states than in those whose populations are ethnically homogeneous, and he cited Switzerland as a striking example.<sup>6</sup> Likewise, Bluntschli asserted that a state may gain "in breadth and variety by the inclusion of foreign elements, which serve to establish and keep open communication with the civilization of other peoples." "Such an admixture," he added, "may serve as an alloy to give strength and currency to the nobler metal."<sup>7</sup> De Parieu quoted the Emperor Francis II of Austria as once saying to the French ambassador: "My people are strangers to one another and yet it is for the better. They never have the same ills at the same time. In France when there is an epidemic of fever, you all have it the same day. I have Hungarians in Italy and Italians in Hungary. Each watches his neighbor; they never understand one another and in fact detest one another. Their antipathies, however, conduce to order, and their mutual hate to the general peace."<sup>8</sup>

<sup>6</sup> *Op. cit.*, pp. 115 ff.

<sup>7</sup> "Theory of the State," p. 105. Compare also Treitschke ("Politics," vol. I, p. 223), who remarks that "God Almighty did not separate the nations into glass cases as if they were botanical specimens, and we can see for ourselves how history has molded them all."

<sup>8</sup> "Principes de la science politique," p. 304.

**Lord Acton's Attack on the Theory of Nationality.**—Lord Acton, one of the most brilliant of modern historians, made a vigorous attack upon the whole theory of nationality, in so far as it maintains that nationality is an essential element in the formation of states, and he characterized it as being "more absurd and more criminal than the theory of socialism." "There is," he said, "no principle of change, no phase of political speculation conceivable, more comprehensive, more subversive, or more arbitrary than this. It is a confutation of democracy because it sets limits to the exercise of the popular will, and substitutes for it a higher principle." The "combination of different nations in one state," he said, "is as necessary a condition of civilized life as the combination of men in society. Inferior races are raised by living in political union with races intellectually superior. Exhausted and decaying nations are revived by the contact of a younger vitality. Nations in which the elements of organization and the capacity for government have been lost, either through the demoralizing influence of despotism, or the disintegrating action of democracy, are restored and educated anew under the discipline of a stronger and less corrupted race. This fertilizing and regenerating process can only be obtained by living under one government. It is in the caldron of the state that the fusion takes place by which the vigor, the knowledge, and the capacity of one portion of mankind may be communicated to another. Where political and national boundaries coincide, society ceases to advance, and nations relapse into a condition corresponding to that of men who renounce intercourse with their fellow men... The coexistence of several nations under the same state is a test as well as the best security of its freedom. It is also one of the chief instruments of civilization; and as such it is in the natural and providential order and indicates a state of greater advancement than the national unity which is the ideal of modern liberalism." States in which there is no mixture of races, he contended, are "imperfect and those in which its effects have disappeared are decrepit."<sup>9</sup>

**Observations on Lord Acton's View.**—No more powerful

<sup>9</sup> "History of Freedom and Other Essays," pp. 289-298. Zimmern, "Nationality and Government" (pp. 20, 48), shares the view of Lord Acton, whom time, he says, has borne out. "Nations, like men, were made not to compete, but to work together . . . . "it takes all sorts of nations to make a modern state" (p. 20).

criticism of the doctrine of the "mono-national" state or more eloquent defense of the "poly-national" type has ever been made. While there is much truth in what Lord Acton said in regard to the value of the latter type of state, both as an influence upon the character of the people and as an instrument of civilization generally, it is not without exaggeration. Thus his statements that the "poly-national" state is that which Providence indicates, that it provides the best security for freedom, that the "mono-national" type is "imperfect," and that the combination of different nationalities under the same state organization is necessary to civilized life as the combination of men in society, are not invariably supported either by history or by actual experience.

It is only under ideal conditions that the advantages of the "poly-national" state outweigh those of the "mono-national" type conditions such as exist only in a few states like Switzerland, Great Britain, and the United States, where the various nationalistic groups have consented voluntarily to live with one another under the same state organization, where they are satisfied with their united situation, where they have substantially identical interests and ideas, and where they are not oppressed by a more powerful nationality or denied such rights as appertain to the use of their language, the education of their children, and the exercise of their religion. On the other hand, in states which have been formed by the forcible annexation or incorporation of unwilling nationalities or in those which were voluntarily formed, but in which a nationality subsequently became dissatisfied, the advantages claimed by Lord Acton are hardly likely to exist. Viewed from the standpoint of the interests of the discontented nationality, the cause of peace, and the advancement of the common civilization, the division of the state in such circumstances is desirable, assuming, of course, that the discontented nationality constitutes something more than an inconsiderable fraction of the total population. Thus it would seem that the concession of independence to important nationalities like the Irish, the Poles, the Czechs, the Southern Slavs, the Balkan races, and others, intensely dissatisfied as they were, not only left the states from which they separated stronger and more stable internally, but also contributed to the promotion of the general peace. Such nationalities should, according to some writers, be permitted and even encouraged to separate themselves from what they regard as unnatural unions and to organize themselves into independent states.

rather than be repressed and governed by force against their will.<sup>10</sup> The proper conclusion therefore is that where the dissatisfied nationality constitutes at least a large fraction of the population it has a moral right, if the doctrine of self-determination has any meaning, to a separate state organization, although as the committee of jurists in the Aland Islands case correctly maintained, the right is not one which is recognized by positive international law.

**Problems of Nationality.**—Where a state embraces more than a single nationality, the several nationalities may be substantially equal in population and strength, or they may be unequal. And where they are unequal in population, it may happen that the least populous is the superior in culture and civilization. In that case it may be able to acquire an ascendancy over the other nationality or nationalities because of such superiority, or it may do so by sheer force and reduce the others to subjection. Of this latter policy Mill remarked that it was one "which civilized humanity with one accord should rise to prevent."<sup>11</sup> It was Treitschke's view that in such cases "the simplest relationship is that the one which is superior in civilization should wield the authority."<sup>12</sup> This principle would seem to be the only reasonable one, provided of course the rights of the weaker nationality are respected. Treitschke, however, went further and maintained that normally and naturally in case of conquest the victor should have the right to "impose his culture and manners upon the people he has subjugated." "The Germans," he said, "let the primitive Prussian tribes decide whether they should be put to the sword or be thoroughly Germanized," and he added: "cruel as these processes of transformation may be, they are a blessing for humanity. It makes for health that the nobler race should absorb the inferior stock."<sup>13</sup> The domination of the Magyars over the other races of Hungary, prior to the division of that state after the World War, was a striking example of the subjection by one nationality of others, although the Magyars maintained not only that they were culturally and economically superior to the other races but also that numerically

<sup>10</sup> Compare Lecky, "Democracy and Liberty," vol. I, p. 392.

<sup>11</sup> Representative Government," ch. 16.

<sup>12</sup> "Politics," vol. I, p. 283.

<sup>13</sup> *Ibid.*, p. 121.

they constituted an absolute majority over all the other races combined<sup>14</sup> — a contention denied by other races.

Mill remarked that if the smaller but culturally superior nationality succeeds in dominating the others, civilization is often the gainer, but he added that in such a case "the conqueror and the conquered cannot live together under the same free institutions." Again, he said, if the dominating nationality is both the most numerous and the most advanced culturally, and especially if the subjected nationality is small and incapable of asserting its independence, and is governed wisely and justly, it is likely to become reconciled to its position and gradually to become amalgamated with the larger. Finally, Mill pointed out that the most difficult situation is that where the several nationalities are equal, or approximately so, in population and in the various elements of civilization. In such cases the coalescing or amalgamation of the different nationalities is likely to be retarded or even prevented altogether. "Each," he said, "confiding in its strength, and feeling itself capable of maintaining an equal struggle with any of the others, is unwilling to be merged in it; each cultivates with party obstinacy its distinctive peculiarities; obsolete customs, and even declining languages, are revived, to deepen the separation; each deems itself tyrannized over if any authority is exercised within itself by functionaries of a rival race; and whatever is given to one of the conflicting nationalities, is considered to be taken from all the rest." If, he added, they happen to be subject to a despotic government which cares no more for one than another of them, and which treats them all alike, they are likely in the course of a few generations to acquire a fellow-feeling and to become harmonized. But if the aspiration for independence seizes them before this fusion takes place, "there is not only an obvious propriety, but if either freedom or concord is cared for, a necessity for breaking the connection altogether."

**Other Rights of Nationalities : (1) Right to Exist.**—Whatever the differences of opinion regarding the moral right, or the right under international law, of discontented nationalities to separate themselves from the states of which they are an unwilling part and to

<sup>14</sup> Varga, in Alden, "Hungary of To-day" (1909), pp. 23 ff. As to the policy of "Magyarization" in Hungary see Bruyn, "Le problème des minorités," p. 196; and Seton-Watson, "Racial Problems in Hungary" (1908), ch. 5.

organize themselves into new states of their own creation, there is a general agreement that they do have important rights which should be respected by the dominant nationality which controls the government. The "first and most natural" of these rights, said Bluntschli, the one which lies at the base of the others, is the right to exist.<sup>15</sup> A nationality, as we have seen, is a historical formation; it is a group united usually by ethnic, linguistic, and cultural bonds; it is a population having common elements which give it the character of entity more or less separate and distinct from the population of the rest of the state. It is hard to conceive of any considerations of public policy which would justify a state in attempting to extinguish the individuality of a nationality by forbidding the use of its language, by suppressing its literature and its established customs, and by outlawing the national religion.

**(2) Right of Language.**—The strongest bond which unites the members of a nationality, and which constitutes usually its most peculiar possession, is language. They have therefore the strongest moral right to retain and speak their native language, to teach it to their children, and to employ it as the medium of expression in their literature.

But it does not follow that the duty of the state to permit a nationality to retain and use its own language implies also the duty to admit it to an equal footing with the dominant language in the proceedings of the legislature and of the courts, in the administration, or in the army. Considerations of practical convenience may make the use of one language to the exclusion of all others desirable for those purposes. It may be that the other languages are spoken by relatively small part of the population, in which case it is no great hardship to give the preference for state purposes to that one which is spoken by the majority of the population. Thus the Welsh, Basques, the Wends, the Bretons, and the small Romansch-speaking element of Switzerland could hardly lay claim to a right to have the proceedings of the parliaments and the law courts of their respective countries conducted in their languages equally with the other languages. But where the nationalities in a country are approximately equal in numbers it would be otherwise. Thus in Switzerland the French

<sup>15</sup> "Theory of the State," p. 93.

German, and Italian languages are and should be on an equal footing for all state purposes, the proceedings of the parliament, the courts, and the administrative bodies being recorded in all three languages. In the parliaments of Austria and Hungary prior to the division of those states at the end of the World War an even larger number of languages was employed, each being on an equal footing with the others. One of the unceasing complaints of the Magyars of the old Hungary was the refusal of the emperor-king to permit the use of the Magyar language in the army, with the result that Magyar recruits were obliged to learn German, which was the language of command. On the other hand the Germans of Bohemian Austria never ceased to agitate for the recognition of their language in the local administration of that part of Austria where they were numerous.

**German Policy in Respect to Racial Minorities.**—The policy of the German government in respect to the use of the native languages by the French in Alsace-Lorraine, the Danes in Schleswig-Holstein, and the Poles in the German-Polish provinces, was often criticized as a grave infringement of the right here under discussion. In Alsace-Lorraine German was made not only the language of the administration, the legislative council, and the courts of law—which was entirely defensible—but it was required to be used in the schools, and French was prohibited for the names of streets, shop signs, inscriptions on tombstones, etc. Similarly in German Poland, the use of the Polish language was forbidden in public meetings; from the outset it was forbidden in the national schools where half the pupils were unable of understanding German, and, finally, it was decreed that after 1928 the use of the Polish language should be forbidden in all schools. About 1906 the German government went to the extreme length of forbidding the use of the Polish language as the medium of religious instruction—a measure which provoked “strikes” in the schools and widespread disturbances among the Polish population.

In the territory of South Jutland, where there were some 150,000 Danes, the rigor of German policy was even less defensible, because of the small area of territory and the limited population. The use of the native language was not only forbidden in the administration and in the law courts but it was gradually suppressed in the schools except for religious instruction. In 1908 it was forbidden to be used in public

meetings except for election purposes, and except where at least 60 per cent of the population spoke a language other than German. The display of Danish colors and the singing of Danish national songs were also prohibited. These and other measures, regarded by the Danes as oppressive and tyrannical, were rigorously enforced with a view to Prussianizing the territory, and hundreds of offenders were punished by imprisonment or banishment.<sup>16</sup>

**Flemish Agitation in Belgium.**—In March, 1919, during the meeting of the Peace Conference, a committee representing the Flemish population of Belgium laid before President Wilson an appeal in which they said : "No permanent peace will be possible in Belgium unless our people shall have found absolute security that it will no longer be governed, educated, tried in courts of justice or led in its army in a language not its own, but in its old Dutch vernacular, and will be enabled to regain its ancient glorious civilization, instead of being kept down under foreign influence." Although the Flemings assert that they constitute 57 per cent of the total population, French was made the official language of the country. Later, however, the Flemish language was by law placed on an equal footing in Flanders with French in the courts, in the army, and in the administration, but it is alleged by the Flemings that the law was made a dead letter by the French-speaking officials and by French-speaking lawyers in the courts. They complained that there was no state school or University in which Flemish youth could receive a complete education in their own language. They demanded among other things that the university of Ghent be made a Flemish institution, and by recent legislation this has been done in part. They further complained that all official textbooks, reports, and official communications were in the French language. Other complaints were made, the sum and substance of all of which was that the government was endeavoring to "Frenchify" Flanders, and to make the whole country part and parcel of Latin

<sup>16</sup> As to German policy in respect to the treatment of the population of these territories see Dawson, "The Evolution of Modern Germany," ch. 23; Hazen, "Alsace-Lorraine under German Rule" (1917), ch. 6; Philipson, "Alsace-Lorraine" (1918), pp. 163 ff.; Rolleston, "Ireland and Poland, a Comparison" (1917); Barker, "Linguistic Oppression in the German Empire" (1918), and Larson, "Prussianism in North Sleswick," *Amer. Hist. Review*, vol. XXIV (1919), pp. 227 ff.

civilization and culture—a policy which was combated with special vigor by the Catholic clergy.

On the other hand, it is asserted in answer to the Flemish complaints, that their charges regarding the exclusion of Flemish from the schools, the courts, and the local administration in Flanders were not in accord with the facts. Furthermore, it was pointed out that there is no distinct Flemish literary language, that their literary language is Dutch, that in fact the Flemish *literati* generally employ the French language and that if Flemish-Dutch were to gain the supremacy in Flanders, the population would be cut off from the intellectual intercourse of Europe, which is carried on mainly through the medium of the French language.<sup>17</sup>

**The Language Question in India.**—In India, where there is a great variety of languages (there are said to be nearly one hundred spoken languages in the province of Assam), and where English has been made the official language of the country, the nationalists are demanding the displacement of English for one of the vernaculars. They are, however, not agreed as to which one of them should be given the preference. There is no particular one which any considerable part of the total population could understand if it were made the official language of the country. It is not easy, therefore, to see what would be gained by the displacement of English, which is understood by a much larger number of the population than any one of the vernaculars.

**Concluding Observations on the Language Question.**—Viewing the language question from the standpoint not only of the general ultimate good of the particular nationality concerned, but also from the point of view of the advancement of civilization in general, it may be seriously doubted whether the maintenance of the language spoken by small nationalities ought to be encouraged by governments. It is enough that they should be respected and allowed to be spoken and

<sup>17</sup> For discussions of both sides of the question see articles by Van Aken. "The Flemish Issue in Belgium," *N. Y. Times Current History*, vol. XVIII (1923), pp. 786 ff.; Sarolea, "The Danger of Secession in Belgium," *ibid.*, pp. 74 ff.; and Langerock, "The Flemish Demand for Autonomy," *ibid.*, pp. 78 ff.; see also Passeelecq, "La question flamande et allemande" (1917). See pp. 318 ff. for an elaborate bibliography.

used in the primary schools, in religious worship, and for literary purposes. But when the language is one which is purely local, when it is incapable of being employed in international intercourse, and when it is not and cannot become a vehicle of science and general literature, there would seem to be no reason of state policy or public morality why it should be fostered as a living language by the state and accorded the same recognition in the courts, in the administration, in the parliaments, and in the higher educational institutions supported by the state, that is accorded the dominant language, when the latter is a language of general science, literature, and international intercourse. Instances are not lacking in south-eastern Europe where small nationalities have fought for the official employment of their language for state purposes when it was spoken only by a relatively small number of persons and where the entire literature of the language could be carried under one's arm.

**(3) Right to Retention of Local Customs and Law.**—Another right of nationalities which should be respected is the preservation of their local customs in so far as they are not contrary to the generally recognized principles of public morality or state policy. The suppression of the wearing of the kilt, the national costume of the Scotch Highlanders, following the Stuart rebellions in Scotland, was justified on considerations of public order, while the prohibition by the English of suttee (widow-burning) in India was defensible upon grounds of morality. It may be doubted, however, whether a nationality has a right to the maintenance of its local system of law when it is not in harmony with the general law of the country. The Romans, therefore, were probably justified in imposing the Roman law upon the peoples whom they reduced to subjection. Similarly, the French were justified in introducing the Code Napoléon in Alsace as the Germans were justified later in displacing it with their own law when Alsace came under their dominion.<sup>38</sup> Likewise no one would deny the right of Great Britain to apply English law in Wales, or the right of the French to apply French law in Brittany. Instances are not lacking, however,

<sup>38</sup> After the reannexation of Alsace to France, following the World War, the inhabitants, though the great majority of them are deeply attached to France, complained of the policy of the French government in displacing the German local law, under which they had lived for fifty years, for French law.

where the exercise of the right proved to be inexpedient. Thus the attempt of the British to impose the forms of their law and judicial procedure upon the Indians of Bengal in the eighteenth century has been pronounced a serious mistake. Similarly, the imposition by the Romans of their law and administration of justice upon the German tribes in disregard of the Teutonic principle of the personality of law, according to which conquered peoples were entitled to retain their own law, aroused strong opposition and kindled the flame of German freedom.<sup>19</sup> Sometimes, for reasons of public policy, conquered peoples are allowed by the conqueror to retain their own system of law, wholly or in part. Thus upon the conquest of the South African Republic in 1901, the British allowed the system of Dutch-Roman law to be retained in the Transvaal; and in Quebec French law is permitted in large measure.

**Protection of the Rights of Racial Minorities by the League of Nations.**—As has been pointed out above, the territorial rearrangements made by the treaties of peace at the close of the World War left important fragments of alien nationalities in the territories of various old and newly created states.<sup>20</sup> Realizing that these minority groups who differed in race, language, or religion from the majority of the population would be exposed to discriminatory treatment or persecution at the hands of the dominant nationality in control of the government, the Peace Conference made an attempt to provide adequate safeguards for their protection. The treaties of peace with four of the former belligerent powers in whose territories such minorities existed (Austria, Hungary, Bulgaria, and Turkey) placed their protection under the guarantee of the League of Nations. In 1919-1920 treaties embodying the same arrangement were concluded between the

<sup>19</sup> Compare Bluntschli, *op. cit.*, p. 95.

<sup>20</sup> It is estimated that the readjustments made by the treaties of peace at the close of the World War reduced the population of minorities in Europe from about 54,000,000 to 16,800,000, the majority of the latter being Germans, Magyars, and Ruthenians. About one fourth of the population of Yugoslavia consists of minority races; one third of the population of Rumania; two fifths of the population of Czechoslovakia; and nearly half of the population of Poland (including Vilna and East Galicia). Buell, "International Relations," p. 173; Buxton and Evans, "Oppressed Peoples and the League of Nations" (1922), p. 82; Duparc, "La protection des minorités" (1922), p. 332; and Bruyn, "Le problème des minorités" (1923), p. 126.

Allied and Associated Powers, on the one hand, and Poland, Czechoslovakia, Yugoslavia, Rumania, Greece, and Armenia, on the other. All these treaties confer certain rights upon both the *inhabitants* and the *nationals* of the country, without distinction of birth, nationality, language, race, or religion, and such countries undertake to recognize the treaty provisions as a part of their fundamental law,<sup>21</sup> and as international obligations placed under the protection of the League of Nations.

In brief, the rights conferred include equality before the law, political equality free use of language in social and business intercourse, in religious worship, in the press or public meetings, and in the law courts ; the right of minority peoples to establish and maintain at their own expense charitable, religious, social, or educational institutions ; the use of their own language in the primary public schools in towns and districts in which the minority constitutes a considerable proportion of the population ; and an equitable share of the state and municipal appropriations for educational, religious, or charitable purposes. In some of the treaties there are also provisions dealing with particular races or conditions. Thus the treaty with Poland contains special provisions relating to the Jews ; the treaty with Czechoslovakia contains provisions for safeguarding the autonomy of the Ruthenians south of the Carpathians ; and the treaty with Rumania provides for educational and religious autonomy of the Saxons and Czechlers of Transylvania. All the treaties provide that any member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction of the treaty provisions and the Council may thereupon take such action as it may deem proper and effective in the circumstances. In case of any difference of opinion concerning matters of law or fact arising under the treaties the difference shall be regarded as international in character and shall be referred to the permanent Court of International Justice, whose decision shall be final.

Several of the new states with which no such treaties were concluded and which have been admitted to the League of Nations were required as a condition of admission to give an undertaking that they

<sup>21</sup> They are so recognized expressly in the constitutions of Poland, Czechoslovakia, and Yugoslavia.

would apply and enforce the principles of the minority treaties. Such undertakings were given by Albania, Finland,<sup>22</sup> Estonia, Latvia, and Lithuania<sup>23</sup> upon their admission to the League.

**Enforcement of the Treaty Provisions.**—The conclusion of these treaties marked a great step in advance for the protection of racial, linguistic, and religious minorities, and not the least of the important services rendered by the League of Nations has been its intervention to insure the observance of the treaties. It is necessary to admit, however, that its efforts have not been wholly successful. Where there have been complaints and petitions to the Council for redress, the governments accused have shown a disposition to resent the intervention of the League as outside interference in matters which they considered as domestic and not international. In Poland there has been complaint against the dispossession of German farmers and the denial of Polish citizenship to German residents in violation of the treaties; and in Hungary the Jews have complained at the alleged exclusion of Jewish students from the universities. The Turkish government has undoubtedly been the greatest offender, having forcibly expelled large numbers of Greek and Armenian inhabitants of Asia Minor;<sup>24</sup> Greece, on her part, has used pressure to force out of Macedonia large numbers of native Bulgarians; Yugoslavia has employed a similar method to force out Burgarians from the part of Macedonia assigned to her by the treaty of peace; Rumania is said to have made life almost intolerable for the Hungarians of Transylvania; while Poland has raised numerous difficulties for the Lithuanians who chose to remain in Vilna. The effect of all these measures

<sup>22</sup> As a condition of the recognition by the Council of the sovereignty of Finland over the Aland Islands (1921), Finland agreed to permit the use of the language spoken by the inhabitants of the islands in the state schools, subject to the consent of the commune. Undertakings were also given for preserving the culture and local Swedish traditions and for the autonomy of the Islands.

<sup>23</sup> As to the provisions of the so-called Minorities Treaties are especially Rosting, "Protection of Minorities by the League of Nations," *Amer. Jour. of Internat. Law*, vol. XVII (1923), pp. 641 ff. See also Duparc, *op. cit.*, and Fauchille, "Traité de droit international public," vol. I (1922), pt. I, pp. 802 ff., and the authorities there cited. Perhaps the most valuable discussion of the whole subject is found in the lectures of M. Mandelstam entitled "La protection des minorités" before the Hague Academy of International Law in 1923. *Recueil des Cours*, pp. 266 ff.

<sup>24</sup> The number is said to have exceeded one million.

has been to cause a wholesale reshuffling and migration of minority peoples from one state to another. Each nationality having been provided with a home state by the treaties of peace, there is a disposition to compel, by every sort of pressure, those who remain in other states to leave and return to the home state provided for them. The League of Nations has not been able to prevent these clear violations of the spirit if not the letter of the treaties which were concluded for the protection of the unfortunate victims.

**Situation of the Germans in South Tyrol.**—It may be observed in this connection that no treaties were concluded for the protection of minorities who may happen to be found in the territories of any of the Allied and Associated Powers. As has been said above, South Tyrol, inhabited almost entirely by Germans, was detached from Austria and annexed to Italy. This was for the alleged reason that this territory was necessary to give Italy a "strategic" frontier. As there are no treaty guarantees for their protection, the 250,000 Germans in the annexed territory are left entirely to be dealt with by the Italian government in such manner as its sense of justice or its views of state policy may demand. The inhabitants addressed a protest to the Peace Conference, expressing their feeling of grief and despair at being annexed to Italy without their being consulted by means of a plebiscite, but it was without effect. An Italian delegate (Tittoni) at the Conference pledged his word that the language and cultural institutions of the people annexed would be respected and similar assurances were later given by prominent members of the Italian Chamber of Deputies, who expressed regret that "strategic" considerations had made necessary the annexation of the territory. For a time these promises were observed by the Italian government, but with the advent to power of the Fascisti party a change of policy was adopted. Local meetings and processions are said to have been broken up, sometimes by violence, German teachers in the schools were displaced, local German officials and judges were dismissed, the use of the German language in the schools was forbidden, and in consequence hundreds of schools were closed, and even religious instruction was required to be given in the Italian language.<sup>25</sup> The names of towns and villages and even of roads

<sup>25</sup> For a detailed and highly documented account of the Italian measures against the rights of the Germans in South Tyrol, see Voltein, Verdross, and Winkler, "Deutsch Südtirol," vols. I, II, *Schriften des Institut für Statistik der Minderheiten*

and streets have been changed from German to Italian ; the use of the German language in public transactions has been prohibited ; and historic monuments and portraits of national heroes have been removed from the schools and public places. By these and other measures an attempt had been made to Italianize completely the province and to extinguish so far as possible all traces of a once vigorous nationality.

**Exchange of Racial Minorities.**—It has been suggested that where the voluntary assimilation of racial minorities appears to be impossible a practicable and equitable means of solving the problem would be an exchange of such population for those of another state, who possess the ethnic nationality of the state in which they constitute a minority.<sup>26</sup> This solution, in appearance at least, was applied in 1923-1925 in the relations between Greece and Turkey. The defeat by Turkey of Greece in 1922 was followed by a general exodus of the Greeks from Asia Minor, in order to escape massacre or maltreatment by the victorious Turks. Upon the suggestion of Dr. Nansen at the Lausanne Peace Conference, Greece and Turkey concluded a convention (Jan. 30, 1923) under which the two powers agreed to exchange a portion of their minorities : the Orthodox Greeks of Asia Minor for the Ottoman Moslems in Greece. The émigrés were permitted to take with them their personal effects, and they were to be paid for their immovable property by the government of the territory in which it was found, the value to be fixed by a mixed commission. The Greek government reluctantly agreed to the exchange and the Greek population of Asia Minor addressed vigorous protests to the Peace Conference at Lausanne, the League of Nations, and the governments of the Allied and Associated Powers. Everywhere deep sympathy was expressed for the unfortunate refugees who became the victims of the arrangement. In appearance a voluntary exchange, in fact it was a mass expulsion of the Greeks.<sup>27</sup> A more genuine case of reciprocal

*Völker an der Universität Wien* (Deuticke, Leipzig unl Wien, 1925). See also an article entitled "The Iron Hand of Italy over German Tyrol" by Lilian Frobenius-Eagle, in the *N. Y. Times Current History Magazine*, Feb., 1925, pp. 701 ff.; and one by Kunz entitled "Italian Rule in German South Tyrol," *Foreign Affairs*, April, 1927, pp. 500 ff.

<sup>26</sup> Giraud, "Le droit des nationalités, sa valeur, son application," *Revue générale de droit international public*, 2d series, vol. VI (1924), p. 53.

<sup>27</sup> Giraud, article cited pp. 56-58, and Tenekides, "Le statut des minorités et l'échange obligatoire des populations greco-turques," same *Revue*, pp. 72 ff. Under

exchange of minorities was that provided for by a convention between Bulgaria and Greece, signed at Neuilly November 29, 1919. It differed from the Turkish Greek convention in that the arrangement was entirely voluntary and did not have the character of a forcible expulsion.

the arrangement some 400,000 Moslems were transferred from Greece to Turkey, while approximately 250,000 Greeks were transferred from Turkey. About 1,250,000 Greeks had already been forcibly exiled from Anatolia before the exchange agreement went into effect.

## CHAPTER VIII

### SOVEREIGNTY

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### I. NATURE AND ORIGIN

✓ **Nature of Sovereignty.**—As pointed out in an earlier chapter, the constituent element which distinguishes most fundamentally the state from all other human associations is sovereignty—the supremacy of will and power. In every fully independent state there is some person, assembly, or group (e.g., the electorate) who or which has the supreme power of formulating in terms of law, and of executing, the collective will; that is, the final power to command and enforce obedience to its authority. Other associations have collective wills and may formulate opinions, but it is the peculiar characteristic of the state that its will alone dominates and overrides, in case of conflict, all other wills, whether of persons or associations. To it all other wills are potentially subject. The will of the state once declared represents the last word regarding the matter upon which it has made a decision.<sup>1</sup> It does not admit the right of any other body or association to exercise the power of sovereignty within its territory or even to share with it the exercise of that power.

♪ **The Idea and the Term.**—Although the term "sovereignty" is modern, the idea goes back to Aristotle, who spoke of the "supreme power" of the state.<sup>2</sup> The Roman jurists and the civilians throughout the Middle Ages likewise had the idea, for they frequently employed the terms *summa potestas* and *plenitudo potestatis* by which to designate the supreme power of the state. The modern terms "sovereign" and "sovereignty" (*souverain*, *souveraineté*) were first used by the

<sup>1</sup> Compare Maine, "Early History of Institutions" (1875), p. 349, and Willoughby, "Nature of the State" (1896), p. 185.

<sup>2</sup> See his "Politics," bk. III, ch. 7.

French jurists, notably by Beaumanoir and Loyseau in the fifteenth century,<sup>3</sup> and later they found their way into English, Italian, and German legal and political literature.<sup>4</sup> Bodin in the sixteenth century was the first writer to discuss at length in his "Six Books on the Republic" the nature and characteristics of sovereignty. In the Latin edition of his work he employed the term *summa potestas* and in the French edition the term *souveraineté*.

While the ancient and medieval writers undoubtedly had some notion of the modern idea of sovereignty, it was more or less vague and confused, due in large part, no doubt, to the fact that the sovereignty of the state as we understand it to-day was largely non-existent.<sup>5</sup> It was the struggle between the rising national state and its various internal and external rivals—the Holy Roman Empire, the papacy, and the feudal lords—during the late Middle Ages which gave rise to the modern doctrine of the sovereignty of the state and which called forth the first literature dealing with the subject. It was especially in France that this struggle assumed the fiercest proportions. The French kings vigorously combated the pretensions of the emperor, the pope, and the feudal nobility, and asserted that they held their kingdoms by their swords and from God alone. "Le rois," said the great Saint Louis, "n'a point de souvrains es choses temporieus." French jurists came to the aid of their kings with a legal theory which served both as a weapon of defense and a justification of the royal claim to supremacy. This was the theory not so much of state sovereignty as it was of monarchical sovereignty. "The king is sovereign above all," said Beaumanoir, "and we name him when we speak of the sovereignty which belongs to him."

Originally, sovereignty was not conceived of as implying the total

<sup>3</sup> Viollet, "Establishments de Saint Louis," vol. II, p. 370; Carré le Malberg, "Théorie générale de l'état," vol. I, pp. 73-74.

<sup>4</sup> It is somewhat singular that the Germans have no word which is the exact equivalent of the English word "sovereignty." They accordingly use a modified French term *Souveränität*. The German words *Herrschaft*, *Staatsgewalt*, *Obergewalt*, and *Staatshoheit* have reference rather to the power of the monarch, the power of the state, and the dignity or majesty of the state than to sovereignty. Jellinek, "Recht des modernen Staates," French translation, vol. II, p. 128; Bluntschli, "Theory of the State," p. 494; and Carré de Malberg, *op. cit.*, p. 86.

<sup>5</sup> Jenks, "The State and the Nation" (p. 260), remarks that the heads of Cambridge colleges were designated as "sovereigns" in a fifteenth-century law report.

independence of the monarch as over against his various rivals, but before the end of the sixteenth century it came to be regarded as an absolute supremacy and therefore an indivisible power.

**Sovereignty Identified with the Monarch.**—Originally conceived as a personal attribute of the monarch, sovereignty came in the hands of Bodin to be regarded as a constituent element of the state, although Bodin himself did not avoid confusion, for he identified sovereignty with the power of a particular organ of the state. In France this organ was the king, and to him Bodin attributed the right of sovereignty. Bodin and other early writers also fell into the error of confusing the sovereign power with the power of government. Thus he enumerated as "true marks of sovereignty" the power to make laws, to declare war and make peace, to create offices, judge legal controversies, etc. In fact these powers do not result from the notion of sovereignty, but are nothing more than the usual prerogatives of particular organs of the government. It is not unnatural that the sixteenth-century writers should have identified the sovereignty of the state with the power of the monarch, mainly because the struggle which gave rise to the conception of sovereignty was undertaken and sustained by the monarch himself in order to establish his personal independence. As the king triumphed in the struggle, it was equally natural that sovereignty should have been regarded as belonging to him.<sup>6</sup>

✓ **Some Definitions of Sovereignty.**—Definitions of sovereignty, like definitions of the state, vary according to the opinions of their authors. Bodin, the first writer to employ the term, defined it as the "*summa in cives ac subditos legibusque soluta potestas*"—the supreme power of the state over citizens and subjects, unrestrained by law. Grotius, who wrote half a century later, defined it as "the supreme political power vested in him whose acts are not subject to any other and whose will cannot be overridden."<sup>7</sup> Blackstone conceived it to be "the supreme, irresistible, absolute, uncontrolled autho-

<sup>6</sup> As to this and the origin of the conception of sovereignty see especially Carré de Malberg, *op. cit.*, pp. 72-78; Duguit, "L'état," vol. I, pp. 339 ff.; Rehm, "Allgemeine Staatslehre," pp. 40 ff.; Meyer, "Lehrbuch des deutschen Staatsrechts" (6th ed.), ch. 1; and Jellinek, *op. cit.* (French translation), vol. II, pp. 78 ff.

<sup>7</sup> "De Jure Belli et Pacis," bk. I, ch. 3, Whewell's ed., p. 112.

rity in which the *jura summi imperii* reside."<sup>8</sup> Jellinek defined it as "that characteristic of the state in virtue of which it cannot be legally bound except by its own will, or limited by any other power than itself."<sup>9</sup> Duguit says that sovereignty according to the dominant theory in France is the "commanding power of the state; it is the will of the nation organized in the state; it is the right to give unconditional orders to all individuals in the territory of the state."<sup>10</sup> Burgess characterizes it as "original, absolute, unlimited power over the individual subject and over all associations of subjects."<sup>11</sup> Again he calls it "the underived and independent power to command and compel obedience."<sup>12</sup>

## II. KINDS OF SOVEREIGNTY

✓ **Titular Sovereignty.**—The term "sovereign" is used by writers in various senses. In the first place it is used in a titular or nominal sense to designate a king or other monarchical ruler who has ceased in fact to be a real sovereign and has become merely an organ of the government. It is used in this sense in Great Britain, where the king is officially referred to as the "sovereign." Thus indictments for crime are in the name of "our Sovereign Lord the King." This usage dates back to the time when the king was in reality the sovereign, and although he has long since ceased to be such in fact the usage is retained as one of those numerous fictions which still survive in English law and legal literature.

<sup>8</sup> "Commentaries on the Laws of England," Chase's ed., p. 14. Justice Story of the United States Supreme Court defined it in almost the same language—see his "Commentaries on the Constitution of the United States," vol. I, sec. 207.

<sup>9</sup> "Lehre von den Staatenverbindungen," p. 34; also his "Recht des mod. Staates," pp. 421 ff. <sup>10</sup> "Droit constitutionnel," vol. I, p. 113.

<sup>11</sup> "Political Science and Constitutional Law," vol. I, p. 52.

<sup>12</sup> *Political Science Quarterly*, vol. III, p. 128. Other definitions are the following: "Sovereignty is that power which is neither temporary nor delegated, nor subject to particular rules which it cannot alter, nor answerable to any other power on earth," Pollock, "History of the Science of Politics," p. 49; "Sovereignty is the supreme will of the state," Willoughby, "Nature of the State," p. 280. Carré de Malberg (*op. cit.*, vol. I, p. 70) says sovereignty is not a "power" but rather a "quality"; it is the supreme characteristic of a power—supreme in that this power admits no other above it and no other to compete with it. Some writers define it as supreme "will"; others as supreme "power": and other as both.

✓ **Legal and Political Sovereignty.**—In the second place, a distinction is frequently made between *legal* sovereignty and *political* sovereignty. The former represents the lawyer's conception of sovereignty ; that is, sovereignty as the supreme law-making power. The legal sovereign, therefore, is that determinate authority which is able to express in legal form the highest commands of the state—that power which can override the prescriptions of the divine law, the principles of morality, the mandates of public opinion, etc. Behind the legal sovereign, however, is another power, legally unknown, unorganized, and incapable of expressing the will of the state in the form of legal command, yet withal a power to whose mandates the legal sovereign will in practice bow and whose will must ultimately prevail in the state. This is the political sovereign.<sup>13</sup> In a narrower sense the electorate constitutes the political sovereign, yet in a wider sense it may be said to be the whole mass of the population, including every person who contributes to the molding of public opinion, whether he is a voter or not. Powerful as it is, however, the electorate cannot express its will in the form of a legal rule, except where the government is a pure democracy, though it may command the legislature to do its bidding, and if the command is clearly pronounced and fully understood, it will not be lightly disregarded and in fact will usually be obeyed.

Where the will of the legal sovereign and the political sovereign conflict, the former must, however, take precedence, since only that which has been embodied in legal form will be enforced by the courts, however much more in accordance with expediency or abstract justice the mandate of the political sovereign may seem to be. The legal sovereign, observes a well-known writer, is the lawyer's sovereign *qua* lawyer, the sovereign beyond which lawyers and courts refuse to look. For the lawyer a law may be good law, legally, though passed by a parliament which has been condemned by the political sovereign, the electorate. With the wishes or feeling of the electors the lawyer as

<sup>13</sup> "That body is politically sovereign," says Dicey ("Law of the Constitution," 2d ed., p. 66), "the will of which is ultimately obeyed by the citizens of the state." In England, he adds, this sovereign is the electorate, which in the long run can always enforce their will. But the judges "know nothing about any will of the people except in so far as that will is expressed in an act of Parliament and [they] would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors."

lawyer has nothing to do.<sup>14</sup> He may take into consideration their opinions and wishes, but until the latter have embodied in a written legal command they are for him mere *brutum fulmen*. Lord Bryce remarked that the distinction between legal and political sovereignty is largely the result of the difference between the juristic and the popular conception of sovereignty. "To an ordinary layman," he said, "the sovereign is that person or body of persons which can make his or their will prevail in the state, who is acknowledged to stand at the top, who can get his own way and make others go his. For the lawyer, however, a more definite conception is required. To him the sovereign is no other person or body than he or they to whose directions the law attributes legal force, the person or body in whom resides as of right the ultimate power of laying down general rules. This person or body is the legal sovereign and represents the juristic conception."<sup>15</sup>

#### **The Distinction Does not Involve a Division of Sovereignty.—**

Some writers reject the distinction between legal and political sovereignty on the ground that it seems to involve the recognition of a dual sovereignty in the state.<sup>16</sup> A little reflection, however, will show that the distinction between legal and political sovereignty does not rest upon the principle of a divided sovereignty, but rather upon the distinction between two different manifestations of one and the same sovereignty through different channels. As has been said, the one may not harmonize with the other, that is, the expressed will of the legal sovereign may not be that which the political sovereign has commanded, in which case the legal sovereign ought to be reorganized or reconstituted by a new election, otherwise the will of the electorate cannot be made effective. This is nothing more than saying that law ought to conform to public opinion when properly expressed; that the legislature ought to obey the mandate of the electorate; and that when it does not, the electorate and the legislature are out of harmony. The problem of good government, says Professor Ritchie, is largely the problem of the proper relation between the legal and the ultimate

<sup>14</sup> Ritchie in *Annals of the Amer. Acad. of Pol. and Soc. Sci.*, vol. I, p. 401; see also Gilchrist, *op. cit.*, p. 115.

<sup>15</sup> "Studies in History and Jurisprudence," vol. II, n. 505.

<sup>16</sup> Sidgwick, for example, in his "Elements of Politics," App. A.

political sovereignty.<sup>17</sup> Of course, where the system of pure democracy exists, the possibility of divergence between the will of the legal and political sovereigns is eliminated, for under such conditions the two are identical. In a pure democracy the expressed will of the electorate is not mere opinion or mandate, but law itself. Ordinarily, however, the legal sovereign is organized separate and distinct from the political sovereign, and is either some determinate organ like the British Parliament or a constituent body called into existence for the specific purpose of formulating and expressing the sovereign will.

**Legal Sovereignty in Great Britain.**—The distinction between legal and political sovereignty is most prominent in those countries like Great Britain where the constitution may be amended by the legislature and where, in consequence, there is no legal distinction between constitutional and statute law.<sup>18</sup> In Great Britain the Parliament is both the ordinary legislative body and the constituent assembly. It is legally omnipotent and subject to no restraints except those of a moral and physical character. There is no other body of persons in Great Britain capable of making rules which can override or derogate from an act of parliament. The British Parliament is so omnipotent, legally speaking, says Dicey, that it can adjudge an infant of full age ; it may attaint a man of treason after death ; it may legitimize an illegitimate child, or if it sees fit, make a man a judge in his own case.<sup>19</sup> By the act of 1716 it did what only a sovereign body can do, when it prolonged its own existence from three to seven years. It can alter the constitution by the same legal processes that are followed in the enactment of an ordinary statute.

No court will listen to an argument against the validity of an act of Parliament, even though it be contrary to the most sacred prescriptions of the constitution.<sup>20</sup>

<sup>17</sup> *Annals of the American Academy of Political and Social Science*, vol. I, p. 402. Cf. also McKechnie : "The will of the legal sovereign is or should be the authorized embodiment or manifestation of the will of the political sovereign. If the popular will is accurately expressed by the legal sovereign, the power of the people is effective, otherwise it is not." "The State and the Individual," p. 131.

<sup>18</sup> On the distinction between legal and political sovereignty, between *Staats-souveränität* and *Rechtssouveränität*, see Krabbe, "Die Lehre der Rechtssouveränität," especially ch. 1. <sup>19</sup> "Law of the Constitution," 2d ed., p. 45.

<sup>20</sup> Sidgwick is one of the few writers who is disposed to question the legal omnipotence of the British Parliament. He contends that its sovereignty was not

Yet there is a sense in which the British Parliament is not sovereign. There is a power above Parliament whose mandates it must obey and whose will must ultimately prevail upon all matters upon which it pronounces an opinion. This is the will pronounced by the electorate at a general parliamentary election. The lawyers do not recognize this sovereignty and the courts do not take notice of it, and even the Parliament itself might for a time lawfully resist it, but in the end, if the electorate insists upon obedience, Parliament must bow before the popular will and enact its commands into law. In this sense the electorate and not Parliament is sovereign.

**✓ Popular Sovereignty.**—From the discussion of political sovereignty we come naturally to the doctrine of popular sovereignty—a doctrine which attributes sovereignty to that vague and indeterminate mass called "the people." The idea originated with the anti-monarchical writers of the sixteenth and seventeenth century (the *monarchomachs*), notably Marsiglio of Padua, William of Ockam, George Buchanan, Thomas Barclay, Francis Hotman, Boucher, Saurez, Bellarmin, Althusius, and others who, in their attacks upon the prevailing system of absolute monarchy and relying upon the law of nature and the theory of contract, defended the principle of the sovereignty of the people. Sovereignty, they argued, had originally belonged to the people and they could not lose it by prescription and in fact never had alienated it to a monarch.<sup>21</sup>

In the eighteenth century Rousseau proclaimed the doctrine of the sovereignty of the people as with a trumpet blast;<sup>22</sup> it became a fetish

generally accepted until a comparatively recent date, and that even as late as the eighteenth century there were to be found dicta of high judges recognizing legal limitations on the power of Parliament. He quotes Holt in support of the proposition that if Parliament should ordain that a person should be a judge in his own case the act would be void. "Elements of Politics," p. 24. Laski ("The Problem of Sovereignty," p. 268) says, "Theoretically existent, practically parliamentary sovereignty is in the technical sense an absurdity."

<sup>21</sup> As to their teachings and the doctrine of the sovereignty of the people generally see Dunning, "Political Theories from Luther to Montesquieu," ch. 2; Duguit, *op. cit.*, vol. I (1911), pp. 30-31; Esmein, "Droit const.," (1909), pp. 233 ff.; Carré de Malberg, *op. cit.*, vol. II, pp. 152 ff., and MacKinnon, "A History of Modern Liberty" (1906), vol. I, pp. 380 ff. See also Maitland, "Gierke's Political Theories of the Middle Ages," pp. 37 ff.

<sup>22</sup> See his "Social Contract," especially bk. II. Rousseau's theory is criticized by Carré de Malberg, *op. cit.*, vol. II, pp. 157 ff., and by Duguit, *op. cit.*, pp. 33 ff.

with the French revolutionists ; Jefferson in the American Declaration of Independence approved it when he asserted that governments derive their just powers from the consent of the governed, and from then until now it has been generally regarded as the essence of all true democracy. It is, says Bryce, "the basis and watchword of democracy."<sup>23</sup> The term "popular sovereignty" is frequently and generally used by writers in a loose and inexact sense, and when so used it may lead to misconception and even to mischief. Those who attribute sovereignty to the people, and who proclaim that the will of the people is the voice of God, rarely tell us what they mean by the "people." In one sense the people may be viewed as the total unorganized indeterminate mass—"a monster with countless heads, incapable of collective political action"; in another sense they may be regarded as only that portion of the total population which is vested with the electoral franchise. It would manifestly be contrary to the facts to ascribe sovereignty to the people viewed in the former sense. Sovereign power can be legally exercised only by those upon whom the law confers the right or privilege of voting, and then only through legal channels. The formulated will of the whole mass of the people, if that were conceivable, would have no legal validity unless it were expressed in legal form and through the channels prescribed by the constitution for the expression of the popular will. Unorganized public opinion, however powerful, is not sovereignty unless it is clothed in legal form, no more so than the informal or unofficial resolutions of the members of a legislative body is law.<sup>24</sup> The sovereignty of the people, therefore, can mean nothing more than the power of the majority of the electorate, in a country where a system of approximate universal suffrage prevails, acting through legally established channels, to express their will and to make it prevail.

**National Sovereignty.**—The French Revolutionists proclaimed a principle which they described as "national sovereignty." In their

<sup>23</sup> "Modern Democracies," vol. I, p. 143. As to the meaning of the term "people" see *ibid.*, ch. 14.

<sup>24</sup> It is neither incorrect nor mischievous, says Sir George C. Lewis, to speak of the sovereignty of the people in states in which they are not sovereign, if it be done in a metaphorical sense to signify the moral control and influence over the legislature and if the distinction between legal power and moral influence be kept in mind and real sovereignty be not confused with figurative sovereignty. "Use and Abuse of Political Terms," p. 48.

famous Declaration of the Rights of Man and in some of their early constitutions they affirmed that "all sovereignty resides essentially in the nation."<sup>25</sup> This theory of sovereignty, says M. Duguit, became for a certain French school "one of the intangible dogmas like the articles of a revealed religion, and it forms to-day assuredly a positive principle of our political law." He adds: "Now it is not difficult to demonstrate that it is null and that the pretended dogma of national sovereignty is a gratuitous hypothesis and, moreover, a useless postulate." It is false, he argues, because it implies that the nation possesses a personality and a will distinct from the persons and wills of the individuals who compose it—a hypothesis which is undemonstrated and undemonstrable.<sup>26</sup> The French jurist Carré de Malberg, who states that the notion of "national sovereignty" is considered in France to be "one of the fundamental principles of public law and of the organization of the public power," points out that the theory was invented for the negative purpose of denying the old absolutist principle of the sovereignty of the monarch. It was intended to mean also, contrary to the teaching of Rousseau, that sovereignty in France was not divided into some forty million fragments, each individual exercising a portion of it, but that it resided in the collectivity as a whole viewed as a corporate person. It was an affirmation of the principle that sovereignty is a power of the nation personified, that is, the state, and a denial of the principle of individual sovereignty.<sup>27</sup> The conception of sovereignty as residing in the nation personified as the state is of course an abstraction since it can be exercised by or manifested only through physical persons or institutions. National sovereignty is of course not necessarily the same thing as the sovereignty of the people, and it would not be such in a state where a system of approximate universal suffrage did not exist.

**Sovereignty of Reason or Justice.**—A few writers, mostly French, have defended what they call the sovereignty of "reason" or "justice," the only legitimate sovereignty, they say, that can be defended, because it rests upon right rather than upon physical power or force.

<sup>25</sup> The constitutions of Belgium (Art. 25), of Rumania (1923, Art. 33), and of Chile (1925, Art. 2) proclaim the same principle.

<sup>26</sup> *Op. cit.*, vol. I, p. 33.

<sup>27</sup> *Op. cit.*, vol. II, pp. 167-177. Compare also Haurois, "La souveraineté nationale", pp. 8 ff.

This conception is highly abstract and represents an attempt to define sovereignty in terms of ethical rather than legal principles.<sup>28</sup>

***De Facto* Sovereignty.**—In the next place a distinction may be made between the sovereignty which is actually able to make its will prevail, though it may be without legal basis, and the sovereignty which according to legal right is entitled to the obedience of the people, but which in fact may be temporarily displaced in consequence of revolution or expulsion by a usurper. The person or body of persons who or which for the time is able to enforce obedience or in whose rule the people voluntarily acquiesce is the *de facto* sovereign, although he or it is not necessarily the *de jure* sovereign. This sovereign may be a usurping king, a self-constituted assembly, a military dictator, or even a priest or a prophet; in either case the sovereignty rests upon physical power or spiritual influence rather than upon legal right. History abounds in examples of such sovereignties. Cromwell, after he had dissolved the Long Parliament, Napoleon, after he had overthrown the Directory, the English convention which offered the crown to William and Mary, the Southern Confederacy from 1861 to 1865, the Bolshevik régime in Russia following the Revolution of 1917, are instances of actual sovereignties which rested upon no legal basis, though some of them ultimately became *de jure* sovereignties through general acquiescence of the people and by recognition of foreign governments. The temporary occupation of part of a state's territory by a hostile army when the commander displaces the local authority and exacts obedience from the inhabitants is another example of *de facto* sovereignty of which history affords many instances.<sup>29</sup> In some of the instances cited above, the usurping sovereign expelled the legal sovereign from his legally rightful seat and by force compelled the obedience of the inhabitants.

***De Jure* Sovereignty.**—*De jure* sovereignty, on the other hand, has its foundation in law, not in physical power alone, and the person or body of persons by whom it is exercised can always show a legal right to rule. This is the sovereignty which the law recognizes and

<sup>28</sup> Among those who thus conceived sovereignty may be mentioned Guizot, Cousin, Benjamin Constant, and Royer-Collard. See Bluntschli, *op. cit.*, p. 499; Esmein, *op. cit.*, p. 36; and Merriam, *op. cit.*, ch. 5.

<sup>29</sup> For other examples of "actual" sovereignties, see Bryce, "Studies in History and Jurisprudence," vol. II, pp. 513-515.

to which it attributes the right to govern and exact obedience. It does not depend for its validity upon obedience actually rendered, for the law assumes the obedience to be enforceable. As a matter of fact it may not be the actual sovereign, for it may be expelled, as has been said, from its rightful place or may have temporarily disappeared through disorganization or disintegration ; but, however this may be, it has legal right on its side and is lawfully entitled to command and exact obedience. Manifestly, every consideration of expediency requires that the sovereign in actual control should be legally entitled to rule, that is, physical power and mastery ought to rest upon legal right. The sovereign who succeeds in maintaining his power usually becomes in the course of time the legal sovereign, through the acquiescence of the people or the reorganization of the state, somewhat as actual possession in private law ripens into legal ownership through prescription. On account of the manifest advantages which flow from the exercise of power resting on strict legal right rather than upon mere physical force, the new sovereign sometimes has his *de facto* claim converted into a legal right by election or ratification. Such an act on the part of the new sovereign by thus establishing a legal basis for his power strengthens his moral claim to the obedience of the people and diminishes the danger of conspiracies and rebellions on the part of the adherents of the displaced sovereign. There is, as Bryce well observed, a natural and instinctive opposition to submission to power which rests only on force.<sup>30</sup>

**External Sovereignty.**—Strictly speaking sovereignty is an internal power ; that is, power over all persons and things, subject to such exceptions as the state may admit, within its own territorial limits. Many writers, however, especially those on international law, distinguish between internal sovereignty and external sovereignty. Sovereignty,

<sup>30</sup> "Studies in History and Jurisprudence" vol. II, p. 516. Austin ("Jurisprudence," lect. VI) refused to recognize the distinction between *de jure* and *de facto* sovereignty, because, as he said, the adjectives "lawful" and "unlawful" cannot be applied to the term "sovereignty." The only law, he said by which a person or body of persons can be sovereign is its own law, its own command or will, and hence to say that a person or body is the *de jure* sovereign is tantamount to saying that it is legal because it declares itself so to be. According to Austin's view governments may be *de facto* or *de jure*, but the latter terms are inapplicable to sovereignty. Compare Merriam, "History of Sovereignty since Rousseau," p. 147.

they say, has two "faces": the power to command all persons within the interior of the country and the power to represent the state in its relations with other states, including the power to declare war and make peace.<sup>31</sup> The distinction hardly appears to be a sound one; at least it is inexact to describe the latter as "external" sovereignty, since it leaves the implication that a state is sovereign in respect to certain matters outside its own territorial boundaries, which is of course contrary to the fact. Some writers employ the term "external" sovereignty to mean nothing more than the freedom of the state from subjection to or control by a foreign state; that is, the supremacy of the state as against all foreign wills, whether of persons or states. In short, internal sovereignty is sovereignty viewed on its positive side, while the term external sovereignty has reference to its negative aspect or manifestation.

Used in that sense the idea is unobjectionable, but the term "independence" would be preferable, since that is what is really meant rather than sovereignty. Manifestly, if the state is sovereign in internal matters it must necessarily be sovereign "externally," that is, it must be independent. It is submitted that the term sovereignty is one of political science and constitutional law and connotes a relation between a superior and an inferior—between the state and its inhabitants, and is not a proper term of international law since it is inapplicable as a term descriptive of the relations between independent states. The notion of "external" sovereignty is therefore not only inexact but also dangerous, and should be expunged from the literature of both international law and political science.<sup>32</sup>

### III. CHARACTERISTICS OF SOVEREIGNTY

**Permanence, Exclusiveness, Unity, All-Comprehensiveness.**—The distinctive attributes or characteristics of sovereignty are permanence, exclusiveness, all-comprehensiveness, unity, inalienability, impres-

<sup>31</sup> Esmein, "Droit const.," p. 1; Duguit, *op. cit.*, vol. I, p. 113; Carré de Malberg, *op. cit.*, vol. I, p. 80; and LeFur, "L'état fédéral," pp. 444 ff., who remarks that "the expression external sovereignty is only an abbreviated expression for designating the totality of rights by which internal sovereignty manifests itself vis à vis foreign states" (p. 465).

<sup>32</sup> I have cited in *Amer. Pol. Sci. Review*, XIX (1925), p. 2, a large number of recent writers who appear to be of this opinion.

criptibility, indivisibility, and absoluteness or illimitability. By the quality of *permanence* or perpetuity (*Ewigkeit*, as the Germans call it), we mean that quality in virtue of which the sovereignty of the state continues without interruption so long as the state itself exists. It does not cease with the death or temporary dispossession of a particular bearer, or the reorganization of the state, but shifts immediately to a new bearer, as the center of gravity shifts from one part of a physical body to another when it undergoes external change.<sup>33</sup> By *exclusiveness* we mean that quality in virtue of which there can be but one supreme power in the state, legally entitled to the obedience of the inhabitants. To hold otherwise would be to deny the principle of the unity of the state and to admit the possibility of an *imperium in imperio*.<sup>34</sup> By *all-comprehensiveness* is meant the universality of sovereignty within the territorial limits of the state; that is, sovereign power extends over all persons, associations, and things within such territorial limits except those over which the state has voluntarily consented to waive the exercise of its jurisdiction.

**Inalienability.**—By the quality of *inalienability* we mean that attribute of the state by virtue of which it cannot cede away any of its essential elements without self-destruction. Sovereignty can no more be alienated, said Lieber, than a tree can alienate its right to sprout, or a man can transfer his life or personality to another without self-destruction.<sup>35</sup> Rousseau held the same view, though he admitted that power could be transferred.<sup>36</sup> Sovereignty is inalienable because it is the very essence of the personality of the state and its alienation would entail the disappearance of that personality. Sovereignty is the supreme power of the state, it is the vital element of its being, and to alienate it would be tantamount to committing suicide.<sup>37</sup> A few writers, however, adopt the contrary view. Professor Ritchie, for example, declares that the doctrine of inalienability is belied by the facts of history.<sup>38</sup> Of course

<sup>33</sup> Compare Von Mohl, "Encyklopädie der Staatswissenschaften," sec. 16; Jellinek, "Staatenverbindungen," p. 35. The idea of permanence is expressed by the old French proverb, "Le roi est mort; vive le roi."

<sup>34</sup> Von Mohl, *op. cit.*, pp. 118-119. Cf. also Burgess, *op. cit.*, vol. I, p. 52.

<sup>35</sup> "Political Ethics," vol. I, p. 219; cf. Duguit "Droit constitutionnel," p. 131. The doctrine of inalienability of sovereignty was asserted in the French constitutions of 1791 (Tit. III, sec. 1), 1793 (Decl. 25), and 1848 (ch. 1, sec. 1).

<sup>36</sup> "Contrat social," bk. II, ch. 1.

<sup>37</sup> Compare Duguit, "Souveraineté et liberté," p. 82.

<sup>38</sup> See his note in Bluntschli's "Theory of the State," p. 496.

it is not meant that where a state parts with a portion of its territory it retains its sovereignty over the territory alienated. History abounds in examples of territorial cessions involving the alienation of the sovereignty of the state over the territory ceded ; but that is a different thing from saying that the state may cede away its sovereignty independently of a territorial cession and still remain a state ; that is, part with a constituent element. Nor does the principle of inalienability mean that the person or persons in whom the sovereignty for the time reposes may not abdicate. The British Parliament, for example, might dissolve itself without making any provision of calling another Parliament ; so the Czar of Russia could have voluntarily relinquished his rights of sovereignty in favor of a Duma ; but there would not be in either case an alienation of sovereignty by the state but only a transfer from one bearer to another.

The question whether sovereignty can be alienated was much discussed by the jurists and political writers of the sixteenth and seventeenth centuries. The protagonists of royal supremacy admitted that the people may have originally been sovereign, but if they were, they had lost their sovereignty by alienation to the king and it was therefore irrecoverable. This view was maintained, among others, by Suarez, Grotius, Wolff, and Hobbes. The monarchomach writers, however, affirming that the people were originally sovereign, asserted that they had not only never surrendered their sovereignty to any ruler whether emperor, king, or pope, but that they could not do so because sovereignty is by its nature inalienable.<sup>39</sup> Whatever may have been the merits of the controversy, it is now generally taught by jurists that sovereignty is inalienable.

**Imprescriptibility of Sovereignty.**—In the controversy referred to above the question was also discussed whether sovereignty could be lost by prescription, that is, in consequence of non-assertion or non-exercise through a long period of time, somewhat as title to land may be lost by prescription at private law. On the one side, it was contended that if the people were ever originally sovereign they lost their sovereignty, either by alienation, as stated above, or through prescription. Thus in France, it was argued that kings had by means of long

<sup>39</sup> See the summary in Esmein, *op. cit.*, p. 243 ; and Duguit, *op. cit.*, vol. I, p. 31.

possession and exercise acquired by prescription a virtual property right in sovereignty. On the other side, it was maintained that the doctrine of prescription was a principle exclusively of private law which did not run against the rights of the people and could not therefore be invoked in support of an argument that the people had lost their sovereignty through the operation of such a principle. This view is that now generally held by the jurists.

#### IV. THE INDIVISIBILITY OF SOVEREIGNTY

**Only One Sovereign in the State.**—Another characteristic of sovereignty which requires more detailed consideration is the quality of unity. Being the highest will (or power) in the state, it cannot be divided without producing several wills, which is, of course, inconsistent with the notion of sovereignty. As Jellinek remarked, the notion of "a divided, fragmented, diminished, limited, relative sovereignty" is a *contraictio in adjecto*.<sup>40</sup> Were the theory of certain "pluralists" who would split sovereignty into fragments and distribute it between the state and other associations or groups, put into effect it would ultimately lead, in all probability, to the disintegration of the state. The existence of several supreme wills, each equally capable of issuing commands and exacting obedience, would obviously result in conflicts and an ultimate paralysis of the state. If the several supposed wills were coördinate, obviously neither could be sovereign; if one were superior and the other subordinate, manifestly the former would be sovereign and the latter subject, and what would appear to be a division of sovereignty would in fact be no division. By no one was this truth more forcibly set forth than by the American statesman John C. Calhoun, in his "Disquisition on Government," written in 1851. "Sovereignty," he declared, "is an entire thing; to divide it is to destroy it. It is the supreme power in a state, and we might just as well speak of half a square or half a triangle as of half a sovereignty."<sup>41</sup>

<sup>40</sup> *Recht des modernen Staates* (French ed.), vol. II, p. 15. To the same effect see also Laband, "Staatsrecht des deutschen Reiches" (French ed.), vol. I, p. 110; and Carré de Malberg, *op. cit.*, vol. I, p. 139. Treitschke ("Politics," vol. I, p. 136) sarcastically remarks that "a state where sovereignty is divided would be impossible; only political dilettantes like Cicero would dallily with such eclectic fooleries."

<sup>41</sup> "Works," vol. I, p. 146.

**Theory of Divided Sovereignty.**—But this view is by no means universally accepted by publicists and political writers to-day. The existence of a large number of petty states on the continent of Europe during the sixteenth and seventeenth centuries, which were practically, though not theoretically, independent, contributed to the spread of the popular belief in the distinction between part-sovereign and fully sovereign states—a distinction which rests in fact on the notion of a divided sovereignty. In more recent times the formation of so-called composite states: confederations, real unions, and federal states, and the establishment of such relationships as are involved in the creation of protectorates, have powerfully strengthened the divisibility theory.<sup>42</sup>

The question of a dual sovereignty first became a controversy of practical politics in the United States of America toward the middle of the nineteenth century. Under the Articles of Confederation each member of the union expressly retained its own sovereignty, so that the possibility of misunderstanding was avoided. But the constitution of the federal union of 1789 was silent on this all-important subject, hence the questions were left open as to whether sovereignty remained in the individual states where it had formerly rested, whether it was in the united state created by their joint agency, or whether it was divided between the individual states on the one hand and the union on the other. This *casus omissus* was doubtless the result of a compromise between the conflicting forces of particularism and nationalism in the convention which framed the constitution.<sup>43</sup>

The theory of a dual sovereignty under the American federal system was generally held by publicists in America at the time of the

<sup>42</sup> Recent political developments in various parts of the world have given rise to situations which in the opinion of some writers furnish instances of ambiguous sovereignty. An example was formerly found in Manchuria, which is politically a part of China, though from 1900 to 1905 it was administered by Russia in accordance with treaties. Likewise Bosnia and Herzegovina were from 1878 to 1908 under the administration of Austria-Hungary, though under the nominal sovereignty of the Turkish Empire. There is also the peculiar situation described as *condominium*, where two states exercise sovereignty conjointly over the same territory.

<sup>43</sup> For the view that the founders of the republic deliberately evaded the responsibility of formulating their will on this important question rather than insist upon an answer that probably would have resulted in the rejection of the constitution, see an article by A. W. Small, entitled "The Beginnings of American Nationality," in the *Forum* for June, 1895. For a contrary view, see Willoughby, "Nature of the State," p. 271.

adoption of the constitution, it was enunciated in the "Federalist"<sup>44</sup> by Hamilton and Madison, and was adopted at an early date by the Supreme Court,<sup>45</sup> which held that the United States is sovereign as to the powers which have been conferred upon the national government, and that the states are sovereign as to those which were reserved to them, and this view is still maintained by the court. It received the approval of such eminent constitutional lawyers as Judges Cooley<sup>46</sup> and Story<sup>47</sup> and political writers like De Tocqueville, Wheaton, Halleck, Hurd, Bliss, and many others.<sup>48</sup> "There is no question," says Hurd, "that the statesmen of all sections who made the constitution of the United States understood that political sovereignty was capable of division according to its subject and powers."<sup>49</sup> Their view was that the sovereignty is divided between what they called the "nation" on the one hand and the states on the other; that is, each is sovereign within the sphere marked out for it by the constitution of the union. This theory of a dual sovereignty was vigorously combated by Calhoun, who, as already stated, enunciated the doctrine that sovereignty was a unit, incapable of division, and that it existed unimpaired and in its entirety in the separate states composing the union. The question, so far as the United States was concerned, was finally settled by the armed conflict of 1861-1865, but there is still a difference of opinion

<sup>44</sup> See Nos. 32 and 39. The sovereignty, said Madison, is divided between the states on the one hand and the union on the other, so that "the whole sovereignty consists of a number of partial sovereignties."

<sup>45</sup> *Chisholm v. Georgia* (1792), 2 Dallas 435. In this case the Supreme Court declared that "the United States are sovereign as to all the powers of government actually surrendered by the states, while each state in the union is sovereign as to all powers reserved." See also *Ware v. Hylton*, 3 Dallas 232; and the *Licence cases*, 5 How. 504, 538.

<sup>46</sup> "Constitutional Limitations," p. 4.

<sup>47</sup> "Commentaries," secs. 207-208.

<sup>48</sup> For further discussion of this subject, see Merriam, "American Political Theories," ch. 7, also his "History of the Theories of Sovereignty since Rousseau," pp. 163 ff.; Willoughby, "American Constitutional System," ch. 2; McLaughlin, *American Historical Review*, April 1900. Mr. A. L. Lowell asserts emphatically that "there can exist within the same territory two sovereigns issuing commands to the same subjects touching different matters." "Essays on Government," p. 219. Lord Bryce maintained that legal sovereignty could be "divided between coördinate authorities." "Studies in History and Jurisprudence," vol. II, p. 508.

<sup>49</sup> "Theory of the National Existence," p. 295. For a somewhat detailed consideration of the question of the divisibility of sovereignty, see Bliss, "On Sovereignty," chs. 7-8.

among able writers as to whether the power which is left to the states is sovereignty or mere local autonomy.<sup>50</sup>

**Views of Foreign Writers.**—Among foreign publicists we find the same diversity of opinion regarding the divisibility of sovereignty. The English historian Freeman asserted that "the complete division of sovereignty we may look upon as essential to the absolute perfection of the federal ideal."<sup>51</sup> The French scholars De Tocqueville, Esmein, Duguit, LeFur and others appear to hold substantially the same view;<sup>52</sup> and many German publicists support the theory so far as it relates to sovereignty in federal states. The "father" of the divisibility doctrine in Germany was the noted scholar Waitz, and among his followers may be mentioned the names of Von Mohl, Bluntschli, Brie, Westerkamp, Bornhak, Schulze, Rüttiman, and others.<sup>53</sup> After the founding of the empire, however, and the triumph of nationalism over particularism, the theory of a divided sovereignty found less favor among the German jurists and philosophers, and the unity theory came to have more advocates than formerly.<sup>54</sup> According to the latter view, sovereignty in the German Empire (1871-1919) reposed in the totality of the German states regarded as a single personality instead of being divided between the empire, on the one hand, and the states composing it, on the other. When the latter became members of the empire, they gave up their sovereignty,

<sup>50</sup> The late President Wilson attributed to the individual members of the American union the character of real states, although "their sphere is limited by the presiding sovereign powers of a state superordinated to them." "An Old Master and Other Essays," p. 94. The constitution of Mexico (Art. 40) expressly declares the individual states to be "sovereign" in all that concerns their internal affairs, and that of Switzerland (Art. 3) declares that the cantons are "sovereign" in so far as their sovereignty is not limited by the federal constitution.

<sup>51</sup> "History of Federal Government," p. 4, see also p. 15.

<sup>52</sup> Esmein, "Droit constitutionnel," 4th ed., p. 7; Duguit, "Droit constitutionnel," t. I, p. 119.

<sup>53</sup> For discussions of this question see especially Brie, "Der Bundesstaat," sec. 10; and LeFur, "L'état fédéral et confédération d'états," p. 485, who maintains that the member states of federal unions "participate" in the formation of a sovereign will (p. 673). Borel ("La souv. et l'état fédératif," p. 172) maintains a similar thesis. See also Merriam, *op. cit.*, pp. 204 ff. and Carré de Malberg, *op. cit.*, vol. II, pp. 82 ff.

<sup>54</sup> Among the German advocates of the unity theory may be mentioned Gareis, Haenel, Laband, Zorn, Georg Meyer, Martitz, and Jellinek.

receiving in exchange, as Bismarck expressed it, a share in the joint sovereignty of the empire.<sup>55</sup>

**Division of Governmental Power.**—While the better opinion is in favor of the theory that sovereignty is a unit and therefore incapable of division, there is no reason why the expression of the powers of sovereignty, its emanations, or manifestations, cannot be divided and expressed through various mouthpieces and carried out through a variety of organs. Thus, said Rousseau, *power* may be divided, though *will* never can be. It is a unit and indivisible. Those who maintain the divisibility theory, as Rousseau pointed out, really confuse sovereignty with its emanations.<sup>56</sup> The same idea was expressed by Calhoun, who said with evident truth : "There is no difficulty in understanding how *powers* appertaining to sovereignty may be divided and the exercise of one portion be delegated to one set of agents and another portion to another, or how sovereignty may be vested in one man, in a few, or in many. But how *sovereignty* itself, the supreme power, can be divided . . . it is impossible to conceive."<sup>57</sup>

<sup>55</sup> Howard, "The German Empire," pp. 20, 116. Seydel, like Calhoun in American, maintained that the individual states of the empire were sovereign, that they were real states, and that the empire itself was no state. See his "Kommentar zur Verfassungskunde," 2d ed., pp. 6-11.

<sup>56</sup> "Le contrat social," bk. II, ch. 2. The French constitutions of 1791 and 1793 both affirmed the principle of the indivisibility of sovereignty. Duguit (*op. cit.*, I, p. 119), referring to the "dogma" of the indivisibility of sovereignty, asserts that it is incompatible with the principle of the separation of powers. It is difficult to see wherein lies the incompatibility since the separation of powers involves no division of sovereignty, but only a division of governmental power among different organs. See in this connection, Jellinek, *op. cit.*, (French ed.) pp. 158 ff.

<sup>57</sup> Works, vol. I, p. 416. Compare also Willoughby ("The American Constitutional System," pp. 4-5) : "That there cannot be in the same being two wills, each supreme, is obvious. But though the sovereign will of the state may not be divided, it may find expression through several legislative mouthpieces, and the execution of the commands may be delegated to a variety of governmental organs." Compare also George Ticknor Curtis, who says ("History of the Constitution," vol. II, pp. 37-37) : "It is manifest that there cannot be two supreme powers in the same community if both are to operate on the same objects. But there is nothing in the nature of political sovereignty to prevent its *powers* from being distributed among different agents for different purposes." For similar views see Hurd, "Theory of Our National Existence," p. 121; Gareis, "Allgemeines Staatsrecht," p. 31; Funck-Brentano ("La politique," p. 68), and Carré de Malberg (*op. cit.*, vol. II, p. 82), who maintain that though sovereignty cannot be divided, its *functions* may be and its *authority* may be delegated, the forms of delegation being as infinite as the passions and human wills.

Applying this principle to the so-called federal state, we find that the sovereign will expresses itself on certain subjects through the medium of a central government, and on certain other subjects through the organs of the individual political units composing the federation. But there is no partition of sovereignty. There is a division by the sovereign itself of governmental powers and a distribution of them among two sets of organs, but no division of the supreme will itself. To say that the component members of a federal union are partly sovereign, or sovereign within their particular spheres, is an abuse of the term "sovereignty." Juristically it is just as logical to say that a municipal corporation or a religious society is sovereign within the sphere assigned to it by the law. As Jellinek observed, the theory of divided sovereignty in a federal state rests upon a confusion of sovereignty with political power. What is divided, he said, is neither sovereignty nor state power but rather the *objects* upon which their activity is exercised.<sup>58</sup>

"There is no middle ground," says an able writer, speaking of the nature of sovereignty in the American federal system; "sovereignty is indivisible, and either the central power is sovereign and the individual members not, or *vice versa*."<sup>59</sup> That power and that power alone is sovereign in a federal union which can in the last analysis determine the competence of the central government and those of the component states, and which can redistribute these powers between them in such a way as to enlarge or curtail the sphere of either. That power is not in the central government nor in the states; it is over and above both, and wherever it is, there is the sovereign.

The task of "running the sovereign to cover," especially in the "composite" states of to-day, is not always easy, and when discovered it is not always recognized. It is extremely difficult to place one's finger on the exact spot where it reposes. The constitutional lawyer, and the layman do not always travel the same path in the search for it, and they do not always find it in the same place. But it is always present somewhere; and if in the search we push our inquiry until we find that person, assembly, or group which has the power to say

<sup>58</sup> *Op. cit.*, vol. II, p. 167. In the same sense Carré de Malberg, *op. cit.*, vol. I, p. 141.

<sup>59</sup> Willoughby, "The Nature of the State," p. 244.

the last word in all matters of authority, we shall find ourselves in the presence of the sovereign.

#### V. AUSTIN'S THEORY OF SOVEREIGNTY

**Definition of Law and Sovereignty.**—A conception of sovereignty which has been the subject of wide discussion and which has exerted an important influence upon the legal thought of the last half century is that enunciated by the analytical school of jurists of which John Austin was the most conspicuous representative. Austin's views were based largely on the teachings of Hobbes and Bentham, and were first made public in his "Lectures on Jurisprudence," published in 1832. His theory was conditioned mainly upon his view of the nature of law, which he defined in a general way as a "command given by a superior to an inferior." "If a determinate human superior," he declared, "not in a habit of obedience to a like superior receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." "Furthermore," he continued, "every positive law, or every law simple and strictly so-called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme."

The test of sovereignty, then, according to Austin, is habitual obedience to a superior who owes no obedience to a like superior—not obedience by all the inhabitants, but by the "bulk" of the members of the community. This superior cannot be the general will, as Rousseau taught, nor the people in the mass, nor the electorate, nor some abstraction like public opinion, moral sentiment, the common reason, the will of God, and the like; but it must be some "determinate" person or authority which is itself subject to no legal restraints.

**Criticism of the Austinian Theory.**—Austin's theory that sovereignty must reside in a determinate body has found many critics among historical jurists—Maine, Clark, Sidgwick, and others. In the first place, the theory is criticized on the ground that it is inconsistent with the present-day idea of popular sovereignty—is in fact the com-

plete antithesis of Rousseau's doctrine that sovereignty is the general will, a doctrine which lies at the basis of the modern democratic state. Again, it ignores the power of public opinion, and takes no account of what we have described as *political* sovereignty. Thus, says Sir Henry Maine, it is a historic fact that sovereignty has repeatedly been for a time in the hands of a number of persons *not* determinate, and, he adds, "it is asserted by some writers that this is true of the abiding place of sovereignty in the republic of the United States."<sup>60</sup> Furthermore, Austin's notion of law as a "command" emanating from a "determinate" superior--a conception which lies at the basis of his theory of sovereignty--has been criticized by the historical jurists on the ground that it ignores the great body of customary law which has grown up through usage and interpretation, and which never had its source in the will of a determinate superior; that it errs in treating all law as being merely "command"; and that it exaggerates the single element of force to the neglect of obvious historical facts with which Austin could not have been unacquainted.<sup>61</sup>

Another objection sometimes urged against the Austinian theory is the absolutism which it attributes to sovereignty. Like Hobbes, Austin held that the fountain and source of law could not be limited by any higher law, and hence sovereignty involved legal despotism. There cannot, he said, be a hierarchy of supremacies nor a coördination of creators nor a series of sovereigns ascending to infinity. He frankly admitted that there is no escape from the conclusion that sovereignty is legally unrestrainable, and hence the sovereign is, legally speaking, a despot, however benevolent he may be in fact. But he pointed out,

<sup>60</sup> Compare Dewey, "Austin's Theory of Sovereignty," *Political Science Quarterly*, vol. IX; Maine, "Early History of Institutions," lect. XIII. But apparently Austin was thinking only of *legal* sovereignty, which must from the nature of the case be located in a determinate authority, and not of *political* sovereignty, which may abide in an indeterminate number of persons.

<sup>61</sup> See as to this Maine, "Early History of Institutions," p. 352; Clark, "Practical Jurisprudence: a Commentary on Austin," pp. 166 ff., Sidgwick, "Elements of Politics," Appendix A; Markby, "Elements of Law," p. 24; Lowell, "Essays on Government," ch. 5 (chapter on "Sovereignty"); Wilson, "An Old Master and Other Essays," ch. 5; Ritchie, in the *Annals of the American Academy of Political and Social Science*, vol. I, p. 347; T. H. Green, "Political Obligation," pp. 93-120; Lightwood, "Nature of Positive Law," ch. 13; Merriam, "History of Sovereignty," pp. 145 ff., and Willoughby, "Fundamental Concepts of Public Law," pp. 116 ff. and 129 ff.

what is obviously true, that it does not follow that because the sovereign is unlimited in its powers the government through which it expresses itself is necessarily subject to no restriction.

Austin's chief error consisted in unduly emphasizing the purely legal aspects of sovereignty, and in ignoring the forces and influences which lie back of the formal law—a very natural mistake for a lawyer to make. It may also be said that his theory is probably inapplicable to all states of society, such, for example, as those which Maine described in his work on the "Early History of Institutions."<sup>62</sup> But as a conception of the strict legal nature of sovereignty, Austin's theory is, on the whole, clear and logical, and much of the criticism directed against it has been founded on misapprehension and misconception.<sup>63</sup>

<sup>62</sup> See especially ch. 13.

<sup>63</sup> For a good discussion and criticism of Austin's theory see Jethro Brown, "The Austinian Theory of Law" (1906), especially chs. 3 and 5. See also Borchard, in the *Yale Law Journal*, vol. XXXVI (1927), pp. 41f., and the authors there cited. Austin's views are accepted by most English jurists and by many in Germany. See the list in Borchard, *loc. cit.*, p. 31. In the United States they are accepted in the main by Willoughby.

## CHAPTER IX

### SOVEREIGNTY—(*Continued*)

#### VI. THE THEORY OF LIMITED SOVEREIGNTY

**Non-Legal Limitations.**—The traditional and still generally accepted theory of sovereignty is that it is legally unlimited and unlimitable. Being the supreme power in the state, there cannot, legally speaking, be any authority above it, and to speak of it as being limited by some higher power is a contradiction of terms.

While from the very nature of the case sovereignty cannot be subject to legal restrictions and still remain sovereignty, many writers recognize the existence of certain moral limitations on the power of the sovereign, arising from the natural and inherent rights of man—rights which, according to the views of some authorities, exist independently of the state and cannot therefore be restricted or limited by it.<sup>1</sup> "Although," said Lord Bryce, "some of those who have written on sovereignty described the sovereign as being subject to no restraint whatever, his sole will being absolutely dominant over all his subjects, there has never really existed in the world any person or even any body of persons enjoying this utterly uncontrolled power, with no external force to fear and nothing to regard except the gratification of mere volition."<sup>2</sup> Bluntschli declared that "there is no such thing on earth as absolute independence. . . . Even the state as a whole is not almighty, for it is limited externally by the rights of other states

<sup>1</sup> "The vast mass of influences," says Maine, "which, for short, we may call moral, perpetually shapes, limits, or forbids the actual direction of the forces of society by the sovereign" "Early History of Institutions," p. 359. Giddings ("Descriptive and Historical Sociology," 1906, p. 130) remarks that the theory of unlimited sovereignty is "demonstrably inadequate and even inaccurate." He adds: "There has never yet existed in any human society any power that could, and continuously under all circumstances did, compel the obedience of all individual members of that society." Compare also Laski ("The Problem of Sovereignty," p. 270), who says it is absurd to contend that the state is able to secure obedience to all its acts; and Figgis ("Churches in the Modern State," p. 86), who pronounces the theory of the unlimited state to be the theory of a "despot ruling over slaves."

<sup>2</sup> "Studies in History and Jurisprudence," vol. II, p. 523.

and internally by its own nature and by the rights of its individual members."<sup>3</sup>

Some writers maintain that the sovereignty of the state is limited by the prescriptions of the divine law, or by the power of some super-human authority. The Russian publicist Martens, for example, in his definition of sovereignty recognized in God a "legal superior" over a state otherwise "entirely sovereign."<sup>4</sup> So Bluntschli asserted that nations are "responsible to the eternal judgments of God" as well as to "the facts of history." "There is above the sovereign," said the German writer Schulze, "a higher moral and natural order, the eternal principle of the moral law." The doctrine that the state is absolutely supreme and incapable of doing wrong is, he said, fallacious and dangerous.<sup>5</sup> Other alleged limitations on sovereignty are those arising from the law of nature,<sup>6</sup> the principles of morality, the teachings of religion,<sup>7</sup> the principles of abstract justice, immemorial custom, long-established traditions etc. To these may be added the limitations imposed by the rules of international law, the particular restrictions imposed by conventions between states, and limitations imposed by states themselves by their fundamental law, such, for example, as the method of procedure for altering their constitutions and provisions declared to be unamendable.<sup>7</sup>

<sup>3</sup> "Allgemeine Staatslehre," bk. VII, ch. 1.

<sup>4</sup> "For a state to be entirely sovereign," said Martens, "it must govern itself and acknowledge no legislative superior power but God;" quoted by Lewis, "Use and Abuse of Political Terms," p. 41.

<sup>5</sup> "Deutsches Staatsrecht," vol. I, sec. 16. See also Von Mohl ("Encyklopädie der Staatswissenschaften," p. 117), who did not accept as a literal truth the Biblical doctrine of obedience to God rather than man, though he attached great significance to the idea.

<sup>6</sup> Speaking of the universal binding force of the law of nature, Blackstone said, "No human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." "Commentaries," ed. by Chase, pp. 5-6. Bodin, Grotius, and nearly all the classical writers on international law affirmed that sovereignty was limited by the law of nature and the divine law.

<sup>7</sup> On the subject of limitations on sovereignty see Bryce, *op. cit.*, vol. II, pp. 510 ff.; Bentham, "Fragment on Government," chs. 34-36, "Works," vol. I, pp. 289-291; Ritchie, *Annals of the American Academy of Political and Social Science*, vol. I, p. 393; Laveleye, "Le gouvernement dans la démocratie," vol. I, bk. I, ch. 6; Woolsey, "Political Science," vol. I, p. 203; P. Constant, "Politique constitutionnelle," vol. I, ch. 1; Sidgwick, "Elements of Politics," p. 623; Lowell, "Essays on Government," ch. 5; Dicey, "Law of the Constitution," pp. 70-74;

**Sense in which Sovereignty is Limited.**—It must, of course, be admitted that in a certain sense the exercise of sovereignty is subject to restrictions. The most despotic monarch respects the opinions of his subjects on certain questions and often bows to their wishes. Probably no sovereign, whether monarch or assembly, even existed who assumed and exercised the right to change any law, custom, or institution at his pleasure without regard to the opinions of the mass of the population. All sovereignty, in short, must be conditioned upon the possibility of obedience or acquiescence of those over whom it is exercised.<sup>8</sup> The sultan of Turkey, for example, absolute as he was, would hardly have dared to interfere with the religion of his subjects; the British Parliament, with power legally unlimited, would hesitate to tax the colonies, or to pass a decennial act, or to establish the Episcopal Church in Scotland; it is doubtful if any Roman emperor would have dared to subvert the national religion of Rome; Louis XIV, who is credited with having boasted that he was the state, would never have been able to force Protestantism on his subjects.

An examination of these limitations, however, will show that *legally* they are not restrictions on sovereignty at all. The law of nature, the principles of morality, the laws of God, the dictates of humanity and reason, the fear of public opinion, and other alleged restrictions on sovereignty have no legal effect, except in so far as the state chooses to recognize them and give them force and validity. They are not such limitations as the courts will ordinarily enforce in the decision of legal controversies. Thus, if the British Parliament, which is the legal sovereign in the British Empire, should pass an act opposed to the principles of morality or contrary to the rules of international law, however repugnant the statute might be to the moral sense of the people or their ideas of justice and good faith, it would not be legally invalid. The courts would presume that Parliament did not intend to violate the rules of morality or the

Duguit, "Manuel de droit constitutionnel," pp. 122ff.; Willoughby, "Fundamental Concepts," pp. 76 ff.; Carré de Malberg, *op. cit.*, vol. II, pp. 228 ff., and Jellinek, "Recht des modernen Staates" (French translation), vol. II, pp. 126 ff.

<sup>8</sup> Bryce, in the chapter on "Government by Public Opinion" in his "American Commonwealth," observed that "governments have always rested and must rest, if not on the affection, then on the reverence or awe, if not on the active approval, then on the silent acquiescence, of the numerical majority."

principles of international law, and they would not listen to an argument which rested on the assumption that Parliament had exceeded its authority.<sup>9</sup> If in any case the limitations of the divine law or the law of nature are recognized, the state in the last analysis must be the interpreter thereof, so that in fact the restriction is nothing but a self-limitation. In other words, the principles of morality, of justice, of religion, etc., so far as they constitute limitations on the sovereign, are simply what the state decides them to be, for there can be no other legal conscience than that of the state.

The same may be said of the limitations set by the state upon the manner in which its powers shall be exercised, such, for example, as the method of procedure which it may have prescribed for making changes in its own constitutional organization. Such rules of procedure cannot be considered as legal restrictions upon the sovereignty of the state, and it is a matter of common knowledge that such provisions have in the past been time and again set aside for other methods.

The inevitable conclusion, therefore, to which we are led, is that all attempts to place legal restrictions upon sovereignty are futile and useless. Whoever or whatever can impose limitations on it is itself the sovereign, and not until we reach that power which is legally unlimited do we come into the presence of the sovereign. Supreme power limited by positive law, said Austin, is a flat contradiction in terms.<sup>10</sup>

**Criticism of the Doctrine of Unlimited Sovereignty.**—The doctrine of unlimited sovereignty is sometimes criticized on the ground that it leads to the legal despotism of the state. But granting *arguendo* that sovereignty may be limited in the interest of liberty or the rights of the people, we are no better off. We should still be brought face to face with another sovereign, namely, that which imposes the limitation—the very thing from which we should be seeking to escape. John Austin, with clearness and incisiveness, stated the matter correctly when he said : "the power of the superior sovereign imposing the restraints on the power of some other sovereign, superior to that superior, would still be absolutely free from the fetters of positive law.

<sup>9</sup> Dicey, "Law of the Constitution" (3d ed.), p. 59.

<sup>10</sup> "Jurisprudence," II, lect. VI; see also Burgess, *op. cit.*, vol. I, p. 53. This is the view of such high authorities as Esmein, Markby, Holland, E. C. Clark, Thering, and Funck-Brentano.

For unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would govern the imagined community, which is impossible and absurd."<sup>11</sup>

**The Criticism Not Well Founded.**—It is difficult to see what is to be gained by trying to avoid such a conclusion. It is necessary to recognize in the state a power to which all things and all wills are potentially subject, otherwise the state is no different fundamentally from the other associations and organizations into which mankind is grouped. But this recognition does not imply an admission of the *moral* right of the state to control and regulate all the interests and activities of the people over whom sovereign power potentially exists. In all modern states there are a large group of interests, a wide domain of human conduct, which are in fact exempt from all governmental interference. There is no likelihood that any state will ever exercise all of the power which it is legally capable of exercising. Considerations of expediency, to say nothing of justice, require that in practice the greater part of its power should exist only *in potentia*, and that the individual should be left free from governmental control within a certain sphere. Any sovereign, whether monarch or assembly, which should attempt to exercise its undoubted legal power to regulate all the interests and relations of human life would soon be overthrown by revolution.

It is difficult to see how the doctrine of unlimited sovereignty is inconsistent with the idea of the widest liberty. It does not require profound thinking to see that the more fully and completely sovereign the state, the more secure and permanent must be the liberty of the people.<sup>12</sup> During the eighteenth century the sovereignty of the state was generally confused with the absolutism of particular kings, and therefore the doctrine of unlimited sovereignty had few defenders except among those who, like Hobbes, were the apologists of kings who sought to rule arbitrarily and without regard to the rights of their subjects. With the disappearance of absolute monarchy and the general introduction of constitutionalism, however, the theory of the unlimited sovereignty of the state came to have more advocates than

<sup>11</sup> "Jurisprudence," Students' ed., p. 105.

<sup>12</sup> Compare Burgess, *op. cit.*, vol. I, pp. 55 ff.

opponents. When the state came to be organized outside of the government and sovereignty was understood in its true light, namely, as an attribute of the former rather than of the latter, it became an easy matter to reconcile the doctrine of an unlimited legal sovereignty with that of a limited government.

**The Theory of Self-Limitation.**—A much-discussed theory of sovereignty is that first enunciated by Ihering and later adopted by Jellinek and various other German writers, which conceives sovereignty to be that attribute or power of the state in virtue of which it can be bound only by its own will. This is the theory of auto-determination, auto-limitation, and auto-obligation (*Selbstverpflichtung*, *Selbstbindung*, *Selbstbeschränkung*.) Its supporters do not deny the existence of limitations in fact upon sovereignty—they even admit that the modern state is a *Rechtsstaat*, that is, a state bound by its own law, but they maintain that all such limitations are merely self-admitted and self-imposed restrictions. They assert that the state alone is the source and creator of law, and therefore any limitations which the law imposes upon the power of a sovereign state are limitations which the state has voluntarily imposed upon itself.

Similarly, they admit that the state is bound by the prescriptions of international law and by the stipulations of treaties into which it has entered, but they too are merely self-imposed obligations which the state may throw off at will since, according to their conception of sovereignty, no outside power can impose upon a sovereign state legally binding obligations. Finally, admitting that the state is bound by the principles of the so-called law of nature, that limitation is equally a self-imposed one because the state itself is the judge of what is the law of nature and determines for itself the extent to which it shall be bound by its principles.<sup>13</sup>

**The Theory of Auto-Limitation Criticized.**—The doctrine that the power of a sovereign state can be limited only by its own will

<sup>13</sup> See Ihering, "Zweck im Recht" (1877), vol. I, 3d ed., pp. 307 ff. and 320 ff.; Jellinek, "Recht des modernen Staates" (French ed.), vol. II, pp. 126 ff.; also his "Gesetz und Verordnung," pp. 197 ff.; "Lehre von den Staatenverbindungen," p. 34, and his "System der Subjektiven öffentl. Rechten," 2d ed., pp. 195 ff. and 234 ff. Other German partisans of this theory were Gerber, Laband, Seydel, Treitschke, and Von Liszt. The Dutch jurist, DeLouter, also belongs to this group. (See his "Droit int. pub. positif," 1908, p. 172).

has found many critics, especially among French jurists. Duguit, one of the most eminent of them, pronounces the theory to be brutal, dangerous, and unfounded. He maintains that the state is limited by a jural principle, a rule of law (*une règle de droit*) which has its foundation in the fact of social solidarity and interdependence. He denies that the state is the exclusive source and creator of law. Law is a system of conduct which men observe, and it may exist anterior to the creation of the state and is therefore independent of its will. Likewise, he contends, men have natural rights which also exist anterior to the establishment of the state, and the state is legally bound to respect them and to refrain from making any law which would infringe upon them. The state is, he asserts, a subject of law and is therefore bound by its rules even when it makes the law itself. Consequently, the limitations which the law imposes upon the sovereignty of the state are legal and not merely moral or self-limitations. These limitations are limitations not only on the legislature or other organs of the state but also upon the state itself. He concludes: "This auto-limitation of the state is illusory. If the state is subject to law only because it so desires and only to the extent it so desires, it is not in reality under obligation to law at all," and so it is with regard to the treaties to which it is a party.<sup>14</sup> Many other French writers repudiate the German theory of auto-limitation and hold that the state is bound by law independently of its own will.<sup>15</sup> So does the Dutch jurist

<sup>14</sup> This doctrine is set forth in all of Duguit's numerous writing. See among others his "Droit constitutionnel" (1911), vol. I, pp. 18 ff.; and 50 ff.; his "Law and the State" (*Harvard Law Review*, 1917, Eng. translation by Slovère), pp. 7, 17, 114, 124, 126, 159; and his "L'état, le droit objectif et la loi positive," especially ch. 4. See also the analysis by Elliott in his article "The Metaphysics of Duguit's Pragmatic Conception of Law," *Pol. Sci. Quar.*, vol. 37, pp. 639 ff.

<sup>15</sup> See among others LeFur ("L'état fédéral," pp. 422 ff. and 438 ff.), who says, "Far from being exclusively determined by its own will, the state is, like every other person, determined in part by a foreign power, which is at the same time anterior to and superior to the state; this superior power is that of the law—natural law or rational law." Consequently, he adds, the sovereign state has the power of self-determination only "within the limits of the superior principle of law" (p. 443). See also his article "Le droit naturel ou objectif, s'étend-il aux rapports internationaux?" in the *Rev. de droit int. et de lég. comp.* 1925, pp. 59 ff. To the same effect see Michoud, "Théorie de la personnalité morale," vol. II, pp. 57 ff.; Hauriou, "Principes de droit public," p. 73; and Carré de Malberg, *op. cit.*, vol. I, pp. 228 ff., where the theory of auto-limitation is critically examined. The doctrine of autolimitation is also criticized by Nelson, "Die Rechtswissenschaft

Krabbe, and apparently his American translators Sabine and Shepard,<sup>16</sup> Laski,<sup>17</sup> Figgis,<sup>18</sup> and others, although some of them do not go to the length of Duguit, Michoud, and LeFur, who include in the category of the law which limits the sovereignty of the state, the "principles of natural law."

The merits of this view depend in part upon the conception of sovereignty which is adopted and in part on the soundness of the premise that law has its source outside of and independent of the state. The partisans of the doctrine of auto-limitation adopt a purely formal or juridical conception of sovereignty and refuse to consider it from the historical or sociological point of view. As thus viewed it is hard to see how sovereignty can be limited and still remain sovereignty. If it is subject to other limitations than those which are self-imposed, it is no longer sovereignty in the legal sense. On the other hand, the premise of those who deny the validity of the doctrine of auto-limitation, namely, that law is not the creation of the state and is therefore superior to the state, will never be admitted by the analytical jurists.<sup>19</sup> Furthermore, the thesis of certain "naturalistic" jurists that the state is limited by the principles of natural right and natural law can hardly be accepted unless it be admitted that the state itself is the judge of what those principles are and the extent to which they are binding upon it. If that be admitted, then they are legally nothing more than self-limitations.

Finally, evidence is not lacking that some of those who have attacked the theory of self-limitation have confused the state and

ohne Recht" (1917), p. 59; by Kelsen, "Das Problem des Souveränität und der Theorie des Völkerrechts" (1920), p. 102; and by Borchard, "Political Theory and International Law" in Merriam, Barnes, and others, "Political Theories, Recent Times" (1924), pp. 132 ff.

<sup>16</sup> "Modern Idea of the State" (1911) pp. xlv ff. and pp. 208 ff., also his "Die Lehre von der Rechts Souveränität" (1906).

<sup>17</sup> See especially his "Grammar of Politics," pp. 54, 59, 64.

<sup>18</sup> "Churches in the Modern State," pp. 86 ff. Compare also Maclver, "The Modern State" (1926), p. 478, v. o argues that the state is bound by law because the law is not merely the fiat i. e. the state. "In the great book of the law," he says, "the state merely writes new sentences and here and there scratches out an old one. Much of the book was never written by the state at all, and by all of it the state is itself bound, save as it modifies the code from generation to generation."

<sup>19</sup> Esmein ("Droit constitutionnel," 5th ed., n. 28) characterizes Duguit's notion of sovereignty limited by *une règle de droit* and his phrase *la situation juridique subjective* as "Germanic abstractions which penetrate with difficulty French minds."

government, and when they assert that the state is limited by law, they really mean merely its organs of government. In that sense they are of course entirely correct.<sup>20</sup>

**Limitations of International Law ; the Traditional Theory.**—Is the sovereignty of a state which is a recognized member of the family of nations limited by the obligations which it has assumed by entering into treaties and conventions with other states and by those established by the generally recognized rules of customary international law? Formerly, German writers generally (for example, Hegel, Jellinek, and Treitschke),<sup>21</sup> while admitting that a state may be bound in honor and good faith by its treaty obligations and by those of customary international law, denied that these obligations constituted legal limitations upon its sovereignty. Legally, it was argued, they are voluntarily imposed and consequently amount to nothing more than self-restrictions. Every state, said Treitschke, has "the undoubted right to declare war and is consequently entitled to repudiate its treaties and thus rid itself of the limitations upon its sovereignty which they have imposed. As to the limitations imposed by customary international law, they too are merely self-limitations since the voluntary assent of the state is necessary to their binding validity, and that assent once given can be withdrawn. The subjects of international law being sovereign states, subject to no legal superior, they are the judges in the last analysis of their own rights and of their obligations to other states." This is still the legal theory maintained by some jurists.<sup>22</sup>

<sup>20</sup> Compare the observations of Carré de Malberg, *op. cit.*, vol. I, pp. 237, 238.

<sup>21</sup> See Duguit's analysis of Hegel's doctrine in his "Law and the State," pp. 96 ff.; Jellinek, "Lehre von den Staatenverbindungen," pp. 34 ff., and "Allgemeine Staatslehre," pp. 475 ff.; and Theitschke, "Polities," vol. I, pp. 28 ff. and vol. II, pp. 59 ff. See also Kunz ("La primauté du droit des gens," *Rer. de droit int. et de l'int. comp.*, 1925, p. 575), who puts in the class with Hegel, Lasson, Seydel, and the two Zorns. Their conception of sovereignty, as he points out, is a negation not only of the primacy of international law but also of international law itself.

<sup>22</sup> The courts of Great Britain, e.g., hold that no principle of international law is enforceable in a British court until it has been formally adopted into the body of municipal law by an act of Parliament. See the recent case of *West Rand Gold Mining Company v. Rex*, discussed in the *American Journal of International Law*, vol. II, pp. 223 ff. See also an article as to the American practice on this point, entitled "The Legal Nature of International Law," by W. W. Willoughby, in the *American Journal of International Law*, vol. II, No. 2. See also his "Fundamental Concepts of Public Law" (1925), pp. 81 and 282 ff.

**Denial of the Traditional Theory.**—This view of the sovereignty of the state *vis à vis* other states never was anything more than a pure legal theory and is contrary to the practice and the facts of international life, and it may be seriously questioned whether in view of the recent growth of international solidarity and the development of international law it can any longer be regarded as even a defensible legal theory. An increasing number of jurists to-day deny that the state is in any real sense sovereign in its relations with other states; that is, sovereign in the sense that it is the final judge and interpreter of its obligations to other states, absolutely free to fix its own standards of international conduct or even to determine for itself without responsibility to others what are the purely domestic matters which fall within its exclusive jurisdiction. When one says, as Chief Justice Marshall once said, that the jurisdiction of a state over all persons and things within its territory is "absolute and exclusive,"<sup>23</sup> it may be a correct statement of the traditional legal theory, but it would be pure self-deception to allow ourselves to believe that it is the rule which states actually follow in their intercourse with one another.<sup>24</sup> Chief Justice Marshall himself admitted that considerations of mutual benefit and advantage in practice made necessary "a relaxation of that absolute and complete jurisdiction which sovereignty is said to confer." It is quite true that the limitations imposed upon the freedom of action of a state by ~~treaties~~ and ~~conventions~~ are voluntary and self-imposed and that a state may repudiate them, and, if it has the power, compel the other party to acquiesce in its action. Similarly, a state may refuse to be bound by the obligations created by the generally recognized principles of ~~customary~~ international law. But in both cases the right to do so is limited by the universally recognized principle of international responsibility, according to which the injured state is entitled to demand reparation for the wrong which it or its nationals have suffered thereby, and ordinarily, if it has the power, it will exact by force, if necessary, the reparation demanded. It is only when the injured state chooses to submit to the wrong or is too weak to enforce its demand for reparation that the offending state will be able to make good its claim to absolute freedom of action. American statesmen

<sup>23</sup> Case of the *Schooner Exchange v. McFaddon* (1812), 7 Cranch 116.

<sup>24</sup> Compare Brierly, "Shortcomings of International Law," *Brit. Year Book of Int. Law*, 1924, p. 13, and Krabbe, *op. cit.*, p. 240.

have often asserted that the acceptance of international law and the assumption of its obligations is an essential condition upon which states are admitted to the family of civilized nations; that their ultimate liability to one another is determined, not by their own law, but by international law; and that a state which repudiates the authority of that law places itself outside the pale of international intercourse.<sup>25</sup>

If we examine the facts relating to the intercourse of states to-day, no other conclusion is possible than that the practice no longer corresponds to the traditional legal theory, and if usage and practice are sources of international law, it follows as a consequence that the absolute sovereignty of the state in its international relations is not only a legal fiction but a baneful and dangerous dogma which ought to be abandoned, and that the notion should be expunged from the literature of international law.<sup>26</sup> Much indeed may be said in support of the thesis of Kohler, Pillet, Alpheus H. Snow, and various others that to-day not only is international law superior in fact to the municipal law of every state, but its supremacy has even acquired a legal basis, from which it results that the limitations which it sets to the liberty of action of states are legal limitations and not merely self-imposed restrictions.<sup>27</sup>

<sup>25</sup> See Moore, "Digest of International Law," vol. I, p. 6; Maine, "International Law," p. 38; Phillimore, "International Law," vol. I, p. 78; Wright, "Control of Foreign Relations," p. 358; Borchard, "Political Theory and International Law," in Merriam, Barnes, and others, *op. cit.*, p. 130.

<sup>26</sup> I have developed this idea more at length in my address "Limitations on Sovereignty in International Relations," *Amer. Pol. Sci. Review*, vol. XIX (1925), pp. 1 ff., where the similar opinions of numerous jurists are cited.

<sup>27</sup> Kohler, in the *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1908), p. 209; Pillet, *Rev. gen. de droit Int. Pub.*, vol. I, pp. 9-10; and Snow, "American Philosophy of Government," p. 427, and *Amer. Jour. of Int. Law*, vol. VI (1912), p. 894. Mr. Snow maintained that the international community possesses the character of a federation, with a corporate juristic personality, and that the law of nations by which the rights and duties of its members in their relations with one another are determined is imposed upon them by the society of states, and is not therefore a matter of current or mutual agreement. See also the learned article of Dr. Kunz, an Austrian scholar, entitled *La primauté du droit des gens* (referred to above) where it is argued convincingly that the sovereignty of states is limited by the law of nations. The doctrine of the absolute sovereignty of states (in their international relations) is, he says, "extremely individualistic and anarchistic" (p. 576), and those who defend such a doctrine have had recourse to "juridical artifices, all sorts of absurd fictions and to indefensible theories" (p. 577). He cites various other writers who maintain that the law of nations is

## VII. ATTACKS UPON THE DOCTRINE OF SOVEREIGNTY

**Necessity of Sovereignty Denied.**—Many writers on political science and international law, especially among the Germans, while not denying the reality of sovereignty or the existence of the sovereign state, maintain that sovereignty is not an essential constituent element in the make-up of the state. States, they assert, may or may not be sovereign; in short, states and sovereign states are not necessarily identical. The test of statehood, they argue, is not sovereignty (*Souveränität*), the power of a community to determine the limits of its own competence, but *Staatshoheit*, *Hoheitsrecht*, *Herrschaft*, the right to govern, to command and enforce obedience, etc. Thus Laband, who denies that sovereignty is an essential element in the conception of the state, distinguishes between sovereignty as the supreme power above which there can be no other power that can give legally binding orders, and the power of "domination," that is, the power of a collectivity to command and rule "in virtue of its own right." It is the latter rather than the former which is the true distinctive mark of a state.<sup>28</sup> Jellinek, likewise, denies the necessity of sovereignty as an element of the state. Sovereignty, he says, is not an "absolute category" but an "historical category"; a study of its origin and history will show incontestably that there were states in earlier times which lacked it; the medieval state, in fact, was not a sovereign state, nor were the Hanseatic cities, although they were regarded as states. The

*supra-national* in character and therefore limits the sovereignty of states, among them Von Bar, Nelson (work cited above), Kelsen (*op. cit.*), Verdross ("Die Einheit des rechtlichen Weltbildes," 1923), W. Kaufmann ("Die Rechtskraft des internationales Rechts," 1899), LeFur (*Rev. gén. du droit int. pub.* 1923, pp. 116 ff.), Krabbe (works cited), Duguit, and others. See also Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux," being the title of his lectures before the academy of International Law in 1925. M. Politis adopts the view of Dr. Kunz and like him cites many authorities and cases in support of his opinion. M. Dupuis in his lectures before the academy in 1924 (*Recueil des cours*, 1924, vol. I, ch. 3, "La responsabilité des états") likewise maintains the principle of limited sovereignty in international relations. Professor Triepel, however, in his lectures before the Academy in 1923, subject "Droit interne et droit international" (*Recueil des cours*, 1923, vol. I, pp. 85 ff.), criticizes the doctrine of Kelsen and the others regarding the primacy of international law and the limitations on sovereignty which it imposes, on the ground that it is "absolutely contrary to history."

<sup>28</sup> "Staatsrecht des deutschen Rechts," vol. I, pp. 107-108.

natural-law writers of the sixteenth and seventeenth centuries recognized the existence of non-sovereign states, and the contemporary world furnishes examples of political formations which have their own constitutions and organizations, their own independent spheres of political action, and their own magisterial rights (*Hoheitsrechten*), and which perform the functions of states although they do not possess sovereignty. There are, consequently, two sorts of states: sovereign states and non-sovereign states. The essential characteristic of the state is not sovereignty but state power: the power to command, a power which is not derived from any other authority and which exists and is exercised in its own right. "Every community which may exercise the power of domination conformably to an order which is its own, in virtue of an original power and by original means of constraint, is a state."<sup>29</sup> Both Laband and Jellinek therefore concluded that members of federal unions such as the German Empire might be properly regarded as states, though, of course, not sovereign states, since "they may organize themselves with their own constitutions, based exclusively on their own will and not that of the Empire."<sup>30</sup> Jellinek added that the cantonal constitutions of Switzerland and those of the particular states of the American federal union are constitutions of "states," properly speaking, since they "rest exclusively upon the laws of these states and not upon the will of the federal state superordinated to them." He admitted that the particular states are subject to certain federal restrictions in the formation of their constitutions, but, nevertheless, these constitutions retain their exclusive character as fundamental state laws. On the contrary, a group or community which, having the power of domination, receives its organization and derives its power from a state superior to it and in virtue of the law of this latter state, is not a state. Such, for example, would be the case of a commune, a territory like Alsace-Lorraine from 1871 to 1918, the British colonies, and others.<sup>31</sup> Many other German writers and a few

<sup>29</sup> Jellinek, "Theorie des Staatenverbindungen," pp. 30, 37, 40, 49; and "Recht des modernen Staates" (French translation), vol. II, pp. 142-151. -

<sup>30</sup> They were, of course, referring to the old German Empire (1871-1919). Considering the more numerous restrictions imposed by the new German constitution (1919) upon the power and competence of the individual states (they are in fact no longer called *Staaten* but *Länder*), it may be doubted whether Laband and Jellinek would attribute to them the character of states.

<sup>31</sup> "Recht des modernen Staates" (French ed.), vol. II, pp. 149-155.

French and American writers likewise deny the necessity of sovereignty and do not therefore hesitate to attribute the quality of states to the particular members of federal unions. Among them may be mentioned Rehm,<sup>32</sup> Georg Meyer,<sup>33</sup> Von Mohl, LeFur and Posener,<sup>34</sup> Schulze,<sup>35</sup> Brie,<sup>36</sup> Bluntschli,<sup>37</sup> Michoud,<sup>38</sup> Lapradelle,<sup>39</sup> and Rosin.<sup>40</sup> Among American writers who were partisans of this view was the late Woodrow Wilson. He admitted that members of federal unions do not possess the full power of self-determination in respect to their law as a whole or in respect to their competence. "Nevertheless," he said, "they are still states because their powers are original and inherent, not derivative; because their political rights are not also legal duties; and because they can apply to their commands the full imperative sanctions of law."<sup>41</sup>

**Criticism of the Theory of the Non-Sovereign State.**—The theory of Laband, Jellinek, and others that sovereignty is not an essential element of the state but that the real test or mark of state existence is the original, undervived right to command, dominate, or govern, has been attacked by many able writers. In the first place, they point out that if the power to command and enforce obedience is original, undervived, and independent, then that power is nothing less than sovereignty itself. In the second place, they point out the difficulty of drawing the line of demarcation between states and the territorial and political subdivisions of states, such as provinces, communes, municipalities, etc. The latter have the right to command and govern within their respective spheres equally with the members of federal unions, to which Laband, Jellinek, and others attribute the quality of states. The communes of various European states, as Carré de Malberg points out, have rights which historically are anterior to

<sup>32</sup> "Allegemeine Staatslehre," in Marquardsen, "Handbuch," Einleitungshand, sec. 16.

<sup>33</sup> "Lehrbuch des deutschen Staatsrechts," 6th ed., p. 7. "Sovereignty," says Meyer, "is no essential constituent of the state. There are sovereign and non-sovereign states."

<sup>34</sup> "Bundesstaat und Staatenbund," p. 2.

<sup>35</sup> "Deutsches Staatsrecht," sec. 16; see also LeFur, "L'état fédéral," pp. 690 ff.

<sup>36</sup> "Theorie der Staatenverbindungen," p. 9. "The members of a federal union, observes Brie, "are really states but not sovereign states," p. 112.

<sup>37</sup> "Völkerrecht," sec. 79. <sup>38</sup> "Théorie de la personnalité morale," p. 239.

<sup>39</sup> "La question finlandaise," *Revue du droit public*, 1901.

<sup>40</sup> "Souveränität, Staat, Gemeinde," p. 291.

<sup>41</sup> "Political Sovereignty," in "An Old Master and other Essays," p. 93.

those of the states of which they are a part, and on the theory that the true test of statehood is the power of a collectivity to govern in its own right, they too would be entitled to be regarded as states.<sup>42</sup> Conversely the criterion laid down by Laband is inapplicable to the members of federal unions like Brazil and Mexico, which, originally unitary states, were transformed into federal states by a process of unilateral decentralization rather than by the process of union. The members of such unions therefore have only such rights as were conceded to them by the unitary state; they never were independent states and hence their rights are not original and underived. Even as to federal unions like the United States (and the former German Empire), which were formed by the union of independent states, it is hardly true that the rights of the individual member states are underived, since in fact they have their legal source in the federal constitution; and they embrace only such rights as are "reserved" to them by the instrument which distributes the powers of government between them and the federation. It can hardly be said, therefore, that the powers which are left to them belong to them as of right. Certainly they are not free to determine the limits of their own competence; they are not entirely free, as Jellinek himself admitted, to determine their own constitutions and forms of government. In the United States the constitutions of the individual states must not conflict with the federal constitution, and in both the United States and Germany the individual states are not free to establish any other form of government than the republican system. Both Laband and Jellinek were manifestly in error when they asserted that members of federal unions are bound by no other will than their own; in all such unions they are in fact and in law subject to a higher will which limits their freedom and competence. The criteria which these writers adopted as the basis of the distinction between states and subdivisions of the state, when applied to the members of federal unions, would therefore exclude them from the category of states.<sup>43</sup>

<sup>42</sup> *Op. cit.*, vol. II, p. 152.

<sup>43</sup> See the trenchant criticism by Burgess of Laband's doctrine, in the *Political Science Quarterly*, vol. III, pp. 123 ff. See also the analysis and criticism of the theories of both Laband and Jellinek by Carré de Malberg, *op. cit.*, vol. II, especially pp. 149-158; by Willoughby, "The Fundamental Concepts of Public Law," ch. 15; and Merignac, "Traité de droit international public," vol. I, pp. 178-183. Treitschke was one of the few German writers who denied that the

After all, the answer to the question whether sovereignty is an essential constituent element of the state depends largely upon one's conception of the thing itself and of the nature of the state. If we accept the German distinction between *Souveränität* and *Staatshoheit*, the theory of the divisibility of sovereignty and the distinction between "perfect" and "imperfect" states, we need have no scruple in accepting the doctrine that a political entity which lacks some of the elements of sovereignty may nevertheless be regarded for all practical purposes as a state. On the other hand, if we adopt the contrary notions of sovereignty and of the State and hold that it is sovereignty and sovereignty alone which distinguishes the state in essence from all other human associations and organizations, we shall be obliged to deny that any association or community which lacks this element can, strictly speaking, be regarded as a state. This latter view is that which is held by the great majority of jurists and writers on political science.

Nevertheless, there would seem to be no practical reason why the members of federal unions like that of the United States, whose members were originally independent states, which have retained the name of states, and which have constitutions and governments the character of which they are almost entirely free to determine for themselves, may not be regarded as states, even though they are neither sovereign nor independent and not free to determine the limits of their own competence. Similarly, the great self-governing dominions of Great Britain, which now have an autonomy amounting almost to independence and even a recognized international status, may justly claim to be regarded as states. They now possess every characteristic and power of states except theoretical constitutional independence, and even this they virtually have in practice. Not even the most orthodox analytical jurist would go to the length of calling the member states of the American federal union "administrative districts" or the British self-governing dominions "provinces" or "colonies"; on the other hand he dislikes to speak of them as "states" because they lack that constituent element which he considers essential to a state. Perhaps, as Willoughby suggests, the better alternative is for the analytical jurist

members of the German Empire were states. One of the tests of sovereignty, he said, was the right to determine independently the limits of its power. The "subordinate" countries of Germany had no such right and consequently they were not "genuine states." "Politics," vol. I. p. 30.

to abandon his insistence upon strict scientific precision of terminology, adopt the common usage, and where necessary employ the qualifying adjectives, "sovereign," "part sovereign," "non-sovereign," etc., in order to secure accuracy of expression.<sup>44</sup>

**The Existence of State Sovereignty Denied.**—While the great majority of jurists and political writers accept the theory of the sovereign state as well-established in law and fact, an increasing number of recent writers have pronounced it a useless fiction which no longer corresponds with the facts of the present day. Professor A. D. Lindsay of Oxford University, after arguing that the state is only one of a number of other associations or organizations which possess a corporate personality and wills of their own, and which are occupied with the performance of various public services analogous to those performed by states, concludes that "if we look at the facts it is clear enough that the theory of the sovereign state has broken down."<sup>45</sup> Professor Ernest Barker of the same university expresses substantially the same opinion. "No political theory," he says, "has become more arid and unfruitful."<sup>46</sup> Other jurists who hold essentially the same view are : Professor Krabbe of the University of Leyden, who declares that the notion of sovereignty is no longer recognized among civilized peoples and should be expunged from political theory ;<sup>47</sup> Professor Laski of the London School of Economics, who declares that the theory of the "unlimited and irresponsible state is incompatible with the interests of humanity"<sup>48</sup> and that "the sovereignty of the state will pass, as the

<sup>44</sup> *Op. cit.*, p. 270.

<sup>45</sup> "The State in Recent Political Theory," *The Political Quarterly*, No. 1 (Feb., 1914), p. 136.

<sup>46</sup> See his article entitled "The Discredited State," *The Political Quarterly*, No. 5 (Feb., 1915), pp. 101 ff.

<sup>47</sup> "The Modern Idea of the State" (translation by Sabine and Shepard), p. 35.

<sup>48</sup> "Grammar of Polities" (1925), p. 61. Compare also Holcombe ("Foundations of the Modern Commonwealth," p. 53), who pronounces the sovereign state to be a "legal fiction"; Kennedy ("The Constitution of Canada"), who declares the doctrine of sovereignty as an exclusive and indivisible power to be an "anti-quated political dogma"; and Edward Jenks (*Contemporary Review*, April, 1925, pp. 454 ff.), who considers the theory to be indefensible. Compare also Giddings ("The Responsible State," p. 36) : "In all the dictionaries there is no other word that has more disastrously been conjured with by the metaphysical juggler..... Jurists and political theorists, losing sight of concrete fact, gave their minds to abstractions and wasted disquisition upon conceptual distinctions. And sovereignty became for political science a thing that never was on sea or land."

divine rights of kings had its day";<sup>59</sup> and the late M. Duguit, eminent professor of law in the University of Bordeaux, who says the concept of sovereignty is a fiction without value and without reality and should be banished from the literature of public law.<sup>60</sup> In fact, he says, "the sovereign state is dead or is on the point of dying." "We deny," he adds, "the sovereignty of the state; we affirm that those who govern have not the right to command, . . . because an individual will is always equal to another individual's will, because no man has a right to command another man."<sup>61</sup> Again, referring approvingly to the opinion of Charles Benoist<sup>62</sup> that the notion of the sovereign state is an antiquated "mystical and theological idea," "false in its origin, further falsified by history, and, all things considered, useless, worse than useless—dangerous," Duguit concludes: "there is no sovereignty; there is no commanding and superior will of the state."<sup>63</sup> Duguit's doctrine, however, has found little favor among his fellow jurists of France. Esmein, after an examination of his theory, pronounces it to be a *chimère anarchiste* and declares that it could lead to but one result, namely the "reign of force."<sup>64</sup> Hauriou characterizes it as "doctrinal anarchy" and refers to its distinguished author as an "anarchist of the chair."<sup>65</sup> Michoud similarly pronounced it "anarchic and incompatible with social necessities."<sup>66</sup> Other French jurists have pronounced similar judgments.<sup>67</sup> Duguit, defending himself later from these attacks, pointed out that his theory differed essentially from the doctrine of the anarchists, since he did not deny the necessity or the fact of government; but, as Hauriou and Carré de Malberg have observed, his theory leaves only an appearance and a shadow of

<sup>59</sup> "The Problem of Sovereignty" (1917), p. 209.

<sup>60</sup> "Droit constitutionnel" (1911), vol. I, pp. 86, 107; "Le droit social," etc., p. 20.

<sup>61</sup> "L'état," etc., p. 424. See also Elliott, "The Metaphysics of Duguit's Pragmatic Conception of Law," *Pol. Sci. Quar.*, vol. XXXVII (1922), pp. 639 ff.

<sup>62</sup> "La crise de l'état moderne," p. 31.

<sup>63</sup> "The Law and the State" (translation by Slovère), p. 172.

<sup>64</sup> "Droit constitutionnel" (5th ed., 1909), p. 35.

<sup>65</sup> *Rev. du droit pub.*, vol. XVII, pp. 348, 353, and his "Principes de droit public," p. 79.

<sup>66</sup> "Théorie de la personnalité morale," vol. I, p. 52.

<sup>67</sup> See Carré de Malberg, *op. cit.*, vol. I, pp. 203-204 and the opinions there cited.

government since it takes from the government that which constitutes its strength and utility—the principle of authority.

These attempts to disparage and discredit the theory of the sovereign state have, for the most part, been made by a group of writers as part of a plea for a larger autonomy of the various voluntary associations into which mankind is organized, and who assert that these associations in the sum total of their collective action are of almost equal importance with the state and that they should therefore be recognized as co-partners with the state and sharers of the sovereignty of which it has heretofore claimed an exclusive monopoly. That a sovereign arbiter would still be necessary, however, for adjusting conflicts between them, for protecting some against encroachment by others, and for defending their individual members against the possible oppression of their governing bodies, has already been emphasized earlier in this book.<sup>58</sup>

<sup>58</sup> Chapter IV. Compare also the criticism by Coker, "The Attack upon State Sovereignty," in Merriam, Barnes, and others, "Political Theories, Recent Times," pp. 111-112. See also the vigorous criticism by Hobson in his "Democracy After the War," p. 181.

## CHAPTER X

### THEORIES OF THE STATE

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- WILLOUGHBY, "The Fundamental Concepts of Public Law" (1924), ch. 4; "The Juristic Conception of the State," in *Amer. Pol. Sci. Rev.*, vol. XII (1918), pp. 192 ff.; and "Prussian Political Philosophy" (1918), ch. 2.

#### I. THE JURIDICAL THEORY

**Points of View.**—As has been pointed out in an earlier chapter, the state may be envisaged from various points of view. Thus the sociologist conceives it as primarily a social fact or phenomenon;

the historian as a product of historical development ; the moral philosopher as an institution for the realization of ethical ends ; the psychologist as an organization which manifests its will according to psychical laws ; the political scientist as a political association, established for the purpose of government ; and the jurist as an organ for the creation of law and the protection of legal rights. Each conceives and defines the state in terms of his own science, attributes to it qualities which reflect his own method of thinking, and assigns to it ends which correspond to his own conception. Each is a partisan of particular theories regarding the origin, nature, sphere, function, and ends of the state, and their various theories often differ, one from another, in form and substance.

**Views of the Jurists.**—The theories of the jurists differ accordingly as they belong to the analytical, historical, or sociological school. The analytical jurists are in accord in regarding the state as an institution for the creation, interpretation, and enforcement of law and which acts through and by means of law ; they regard it as the sole and exclusive source of law, since nothing will be applied and enforced as law by its judicial organs which the state has not enacted or recognized and permitted to be enforced as such. The historical jurists agree with them that the state is the source of law, but they deny that law is necessarily a command formally enacted by a law-making organ and having a penal sanction to insure its enforcement. They emphasize the historical development of law ; they point out that a large part of it in the past has consisted of custom which was never formally enacted and consequently cannot be said to have been formally created by the state. As stated above, some jurists, like Duguit, even go to the length of asserting that law may exist anterior to the creation of the state, and therefore is independent of its will, and that the state is bound by this law and has no right to override or disregard its prescriptions.

**The Personality of the State.**—A question which has been the subject of prolific discussion among jurists and political writers is whether the state may be regarded as a "person" in the legal sense, that is a juridical creation having a personality, an individuality, a self-consciousness, and a will of its own, somewhat as a natural physical person has. The lawyers of the Middle Ages recognized what they

called *personae fictae*, that is "artificial" persons (*societas, universitas*) to which was attributed a fictitious legal personality. Such a personality was attributed to certain groups or collectivities including the church, but it never seems to have occurred to the medieval lawyers that logically a similar personality might have been attributed equally to that greatest of all groups, the state. With them the idea of legal personality was a concept exclusively of private law and not one also of public law.<sup>1</sup>

It was not until the nineteenth century was well on its way that the private law conception of legal personality was taken over into the domain of public law and applied to the state, by a group of German writers, notably Stahl,<sup>2</sup> Stein,<sup>3</sup> Gerber,<sup>4</sup> Lasson,<sup>5</sup> and later Gierke, Treitschke, Rehm, Bluntschli, Jellinek, and many others. Gierke reproached the medieval jurists for their failure to attribute legal personality to the state and also for what he regarded as their error in considering the personality of other groups (*Genossenschaften*) to be only a "fictitious" personality. In fact, he argued, they were "real," not "fictitious" persons; they had a body and members of their own; they had wills of their own and could act in the same way that natural persons can will and act. Finally, he concluded, this legal personality was not derived from the state; it was not conceded to them by charter or tacit recognition, but existed independently of the will of the state.<sup>6</sup> His English translator, the late Professor Maitland, one of the most eminent of legal scholars, was a partisan of his theory.<sup>7</sup> Bluntschli likewise conceived the state as *par excellence* a person in the sense of public law (*öffentlich-rechtliche Person*), having a legal will of its own distinct from the sum of the wills of the individuals composing the state, and a capacity for expressing its

<sup>1</sup> Compare Gierke, "Political Theories of the Middle Ages" (translation by Maitland), p. 68, and Borchard in *Yale Law Journal*, vol. XXXVI (1927), p. 19.

<sup>2</sup> "Rechts und Staatslehre," 2 vols. (1830-1833).

<sup>3</sup> "Die Verwaltungslehre," 8 vols. (1864), and other works.

<sup>4</sup> "Grundzüge des deutschen Staatsrechts" (1865).

<sup>5</sup> "Princip und Zukunft des Völkerrechts" (1911). Their theories are reviewed by Coker, "Organismic Theories of the State" (1910), pp. 62 ff., and by Dunning, "Political Theories from Rousseau to Spenser," pp. 306 ff. As to the theories of Gerber and others see Duguit, "The Law and the State" (translation by Slovère, 1917), pp. 119 ff.

<sup>6</sup> See notably his "Das deutsche Genossenschaftsrecht," 2 vols., 1868, 1873, and 1881.

<sup>7</sup> See his translation, *op. cit.*, especially pp. xxvi ff.

will in words and acts ; and as the creator and possessor of rights. Its personality, he added, is not merely a juristic fiction or metaphor, but a reality.<sup>8</sup>

Many other writers, mostly German, a few French and some English, support the theory that the state is a juridical entity separate and distinct both from the people viewed as a collectivity and from the individuals *ut singuli* who compose it, having a personality, a will, and even rights and interests of its own, apart from the rights and interests of the people who form the state. Some of them maintain that this personality is not artificial or fictitious but real, as real as the personality of a human being.<sup>9</sup> In support of their theory that the state may have interests of its own which may not be identical with those of the nation (*i.e.*, the people organized as a state) they point out that the state is a permanent and enduring association, it is a sort of trustee or guardian of the interests not only of the people who compose it to-day but of future generations, it has therefore perma-

<sup>8</sup> "Gesammelte Schriften," vol. I, p. 91, and "Theory of the State," p. 22. Compare also Treitschke, "Politics," I, pp. 15 ff., who asserts that "the state has a personality, primarily in the juridical, and secondly in the politico-moral sense, that from all time it has been a legal person, that it appears to be still more so in the historic-moral sense, and that its will is not fictitious but the most real of all."

<sup>9</sup> Compare Saleilles, "De la personnalité juridique" (1910), pp. 515, 544 ff.; Corbett, *British Year Book of International Law*, 1924, p. 142; O. Mayer, "Die juristische Person und ihre Verwerthbarkeit im öffentl. Recht" (1908), p. 29, and others cited by Carré de Malberg, *op. cit.*, vol. I, p. 12.

The highly metaphysical character of some of the Germanic conceptions finds an illustration in the following observation of Rehm : "The state is not a fiction : it is an abstraction. Behind the fiction, there is nothing real : the abstraction, on the contrary, sees the real, but it sees it other than it is in reality !" "Allgemeine Staatslehre," p. 156.

Most German writers distinguish between the personality of the state as a public power and its patrimonial or fiscal personality. The latter is designated by the word *Fisc* or *Fiskus*. The state as *Fiskus* is the owner and manager of real property : land domains, forests, roads, mines, railroads, telegraph lines, etc. ; as *Fiskus* it incurs loans of money, collects and disburses revenues, enters into contracts, and engages in fiscal operations generally, equally with private corporations. See on the subject especially Hatschek, "Die rechtliche Stellung des Fiskus im bürgerlichen Gesetzbuche" (1899). The distinction has found little approval in England or America and it is vigorously combated by Michoud, Hauriou, Duguit, and other French writers, who maintain that the state forms a single juridical personality which manifests itself, however, in two aspects : one political or public, the other patrimonial or fiscal. Michoud, *op. cit.*, pp. 362 ff., and Duguit, "Droit const.," vol. I, p. 46.

nent interests which may be different from the more immediate and particular interests of the people of any given epoch. Moreover, the interests of individuals as conceived by themselves are often contradictory and it is consequently impossible to determine what is the sum of them, in which case the only ascertainable collective interest is that of the state.<sup>10</sup>

**Criticism of the Doctrine of State Personality.**—A few writers reject *in toto* the whole notion of state personality, the most eminent of them being Professors Duguit and LeFur. The notion, declares Duguit, rests upon a "metaphysical *a priori* conception" and upon "old scholastic concepts which have no value," and it is moreover unscientific. A juridical theory, he adds, has value only in so far as it expresses in abstract language a concrete social reality, a fundamental rule of conduct, or a political institution. "The theory of state personality meets none of these conditions; it is a pure mental concept devoid of all positive reality."<sup>11</sup> Professor LeFur, contrasting the "mystical" or "idealistic" solution according to which the state is regarded as a "fictitious" person, a "moral" or a "juridical" person, with the "realistic" solution which conceives it to be a veritable person, a real being, a living organism, declares that both are in contradiction with the facts which they pretend to explain. The idea of a fictitious person is in itself, he says, easy to understand; but what is not easy to explain is the idea that a fictitious person may be invested with rights of power. The state is not a fiction; it is a real fact, the most important of all social facts. We must choose between two alternatives: this person is fictitious, that is to say, it exists only

<sup>10</sup> Compare LeFur, "L'état, la souv. et le droit," *Zeitschrift für Völker- und Bundesstaatsrecht*, vol. I, p. 18. Compare also Carré de Malberg, *op. cit.*, vol. I, p. 23.

<sup>11</sup> "Droit constitutionnel" (1911), vol. I, p. 47. See also his two volume work "L'état" (1901-1903), written expressly to combat the theory of state personality; also "The Law and the State" (1917), especially pp. 162 ff. Duguit says, "In order to conform to usage we shall often employ the word 'state,' but it is to be understood that in our thought the word designates not at all this pretended collective person which is a phantom, but the real men who in fact retain the power." "Droit const.," vol. I, p. 23. The State will is in fact only the will of those who govern (*les gouvernants*): "L'état," vol. I, p. 261. Compare also LeFur ("La souv. et le droit," *Rev. du droit pub.*, 1908, p. 391), who remarks: "to speak of the rights of the state, is tantamount to speaking of the rights of those who govern."

in our imagination and consequently cannot exercise practically any rights whatever ; or if in fact it really exercises rights, it is real and not fictitious. There is therefore a clear contradiction in assigning an action, a real power, which necessarily supposes a real existence, to a simple fiction. And he adds that practically man alone can be a subject of rights and obligations ; a fiction cannot be a subject either of rights or obligations, nor is it capable of willing or acting.<sup>12</sup>

**Acceptance of the Theory with Qualifications.**—The great majority of jurists, however, attribute to the state a legal personality, though few outside Germany go to the length of regarding it as a person having a will and a consciousness and possessing rights and interests of its own separate and distinct from those of the nation, that is, the people viewed as a politically organized unit, and apparently none are to be found to-day who regard it as a "real" as contradistinguished from an "artificial" or legal person. When they speak of the state as being a "person" in constitutional law or international law they mean nothing more than that it is a sovereign corporation, that is, an "artificial" person as the law regards all corporations, and as such possesses a collective will, a legal capacity, and a power of collective action, apart from the will, the capacity, and the power of action of the numerous individuals who compose it,

<sup>12</sup> "L'état, la souveraineté et le droit," *loc. cit.*, especially pp. 22, 23, 24, 27. Lefur declares that the moment when one treats as a person a thing which is not a person in reality, there is a fiction created by the law or the jurists and this fiction is both dangerous and false in so far as it is anything more than a comparison or a convenient mode of helping one to understand by means of a word an *ensemble* of juridical relations (p. 228). He does not object to the employment of fictions or metaphors for the purpose of comparison, provided it is clearly understood that the thing personified is a fiction and that no attempt is made to deduce from it illogical and false consequences (p. 224). Thus one may properly compare a hero to a lion or a river to a divine benefactor, or to personify glory, death, envy, etc., as the poets do, but such comparisons must not be regarded as anything more than fantasies or conceptions of the imagination (p. 221). To the same effect compare Vareilles-Sonniers, "Les personnes morales" (1902) ; Jèze, "Principes généraux du droit administratif" (3d ed., 1925), pp. 19 ff., and Seydel, "Grundzüge einer allgemeinen Staatslehre," ch. I. Bonnard, "Précis élémentaire de droit admin." (1926), pp. 66 ff., criticize the fictitious personality theory on the ground that it presupposes that the personality of the state is created by the state itself, which is impossible. This criticism hardly seems well-founded. It is not the state which creates its personality ; it is attributed to the state by a fiction of the law.

just as a private corporation has a continued existence and possesses rights and obligations which are distinct from those of its shareholders.<sup>13</sup> These qualities which belong to natural persons are by a fiction of the law attributed to the state ; that is, the state is treated as if it were a person and not as really being a person. This does not imply, as some of the adversaries of the juridical theory appear to believe, that the state thus personified is itself a fiction. On the contrary the state is a reality, the fiction being merely in the mind of the jurist or the provision of the law which attributes to it a legal quality which in a physical sense is possessed only by human beings. When jurists say, as Esmein did, that "the state is the juridical personification of the nation,"<sup>14</sup> nothing more is meant than that the organized collectivity which they call the "nation" possesses the quality of legal personality ; it is not meant that this person or personality is something outside of and above the nation. Nor is it meant that the state is a supplementary person superordinated to the individual personalities of those who compose the state. In short the "nation" becomes a "person," a state.

<sup>13</sup> The word "person" as here used, says Michoud ("La théorie de la personnalité morale," vol. I, pp. 4-7), "signifies simply a subject of law, a being capable of having subjective rights of its own, nothing more, nothing less. The nation expresses a simple fact, the fact that in human societies rights are attributed not only to physical beings, but to certain groups and certain associations." Compare also Willoughby, *op. cit.*, pp. 34 ff., and Carré de Malberg (*op. cit.*, vol. I, pp. 27-28), who remarks that the notion of state personality as thus used does not mean that the state is a real person but only a juridical person. It signifies simply that the members of the collectivity united in an organization implying their submission to a superior authority charged with the direction of the affairs of the collectivity find themselves coördinated in a unified corporation, in a juridical unity which, raised above individuals, forms thus in law, and in law solely, a being distinct from them. From the real point of view there is no state will ; because in the order of positive phenomena, wills expressed in the name of the state are merely the wills of individuals ; but from the juridical point of view it is perfectly correct to speak of the will of the state.

<sup>14</sup> "Éléments de droit constitutionnel" (5th ed., 1909), p. 1. LeFur criticizes this definition of Esmein because, he says, it attaches an exaggerated importance to the notion of fiction. It would be correct, he adds, if the word "government" were substituted for the word "state." "The state is not solely the juridical representation of the nation ; it is the nation itself envisaged from the juridical point of view." Esmein, it is true, speaks of the state as the subject and titulary of sovereignty, as a "moral person," a "juridical fiction," but he explains that he uses the term "fiction" only for the purpose of emphasizing that the personality of the state is not natural in the sense that the personality of a human being is.

only by the fact of its organization and this "person" has no existence outside the nation. Thus, says Michoud, the nation has no distinct juridical existence; the state is nothing else than the nation itself (the collectivity) juridically organized; it is impossible to understand how the latter could be conceived as a subject of right (*droit*) distinct from the state."<sup>15</sup>

The juridical theory in this sense is merely a point of view from which the state is envisaged by the jurist. It may rest upon a fiction, but the law abounds in fictions, as Esmein pointed out, it is sometimes by means of fictions that realities are translated into understandable terms; sometimes they are the most convenient means of explaining juridical relations which result from facts.<sup>16</sup> Professor LeFur, the most vigorous antagonist of the theory of state personality, which he says is false and more dangerous than useful, admits that it may be useful for purposes of comparison, that it may contribute to a better understanding of the reality which lies behind the fiction, that it may be "an excellent means of rendering account of the play of the complicated mechanism of the state," and that it may be useful in certain epochs for distinguishing more easily the interests of the state in its entirety from those of a part of the state, and of those who are governed from those of the governors alone.<sup>17</sup>

## II. THE ORGANISMIC THEORY

### **The Organismic Theory Distinguished from Other Theories.—**

The organismic theory of the state in a sense represents the antithesis of the juridical theory which, at least in the minds of some of its supporters, conceives the state to be a legal fiction or a pure mental concept of the jurists. The organismic theory goes to the other extreme and pictures the state as a real person, a living organism possessing organs which perform functions analogous to those of an animal or plant. It is a biological conception which describes the state in terms of natural science, views the individuals who compose it as analogous to the cells of a plant or animal, and postulates a relation of interdepen-

<sup>15</sup> *Op. cit.* vol. I, p. 288. In the same sense see Orlando, *Rev. du droit public*, vol. III, p. 20, and LeFur, article cited, p. 234, n. 1, who remarks that "the state is the nation hierarchically organized."

<sup>16</sup> Compare Carré de Malberg, *op. cit.*, vol. I, p. 21.

<sup>17</sup> *Op. cit.*, p. 230.

dence between them and society such as exists between the organs and parts of a biological organism and the whole structure. Some of its earlier advocates conceived the state as having "tissues," systems of nutrition and circulation, organs which perform functions analogous to those of the brain, nerves, heart, muscles, and even stomach, navel, nose, hair, and nails.<sup>18</sup> In its extreme form it represents what is sometimes called the *monistic* theory of society, that is, society conceived as a social organism so unified that the individuals who compose it have no real independence but are mere atomistic units in the whole mass, each dependent on the others and upon the whole for its continued existence. Representing the opposite extreme is what has been called the *monadnic* or pure individualistic theory which considers society as primarily an aggregation of individuals, each in large measure living in isolation and independent of his associates, capable of surviving and even of flourishing without the aid of the state, beyond a bare minimum of collective restraint for the protection of the weak against the aggressions of the strong. This theory has had its advocates in the past but few if any reputable writers could be found to-day who are seriously attached to it.<sup>19</sup>

**The Mechanistic Theory.**—Finally, the organismic theory may be contrasted with what has been called the *mechanistic* theory, which regards the state as a purely artificial mechanism or contrivance deliberately created by formal contract or convention, which operates and functions like a machine, and which can be arbitrarily reformed or reconstructed at the will of its creators in complete disregard of historical laws and established traditions. It regards the state as somewhat analogous to an edifice and its founders to a architect; and just as an architect with a commission to construct a new edifice clears the ground of old foundations and débris and erects thereupon a new structure, so the people of a community can make *tabula rasa* of old institutions, cut loose from the past, ignore the forces of history and tradition, and erect upon the ruins a new state organization conceived and fashioned according to their own momentary notions and ideas. This was the

<sup>18</sup> Compare Coker, "Organismic Theories of the State" (1910), p. 194; and Hartwig, "Der Staat als Organismus" (1922).

<sup>19</sup> As to these theories compare MacKenzie, "Introduction to Social Philosophy" (1890), pp. 131-133, and Montague, "Limits of Individual Liberty" (1885), chs. 3-4. Compare also Leslie Stephen, "Science of Ethics" (1882), ch. 3, and McKechnie, "The State and the Individual" (1896).

theory of the French Revolutionists against which Burke protested and directed a powerful attack. History and experience have demonstrated that the theory is largely fallacious. The state is, of course, like all institutions, the work of men but of men working in coöperation with, and not in disregard of, historical forces and of national habits and traditions ; it is not therefore a purely arbitrary mechanical creation in the same sense that a building or a costume is the work of an architect or a tailor. It is what the French call a *formation historique*. It is even more : it is, as the sociologists insist, an organic phenomenon, a social group based upon the fact of unity and interdependence among those who form it.

**History and Literature of the Organismic Theory.**—The so-called organic or organismic conception is, as Jellinek remarked, one of the oldest and most popular of all the theories of the state. In so far as it postulates an analogy between the state and a human being it goes back to Plato, who compared the state to a man of great stature, and conceived a resemblance between its functions and those of an individual.<sup>20</sup> Cicero likewise drew an analogy between the state and the individual, and likened the head of the state to the spirit which rules the human body.<sup>21</sup> The analogy was a favorite theme of medieval and early modern writers, notably John of Salisbury, Marsiglio, Johannes Althusius, and others.

The organic construction of human society, says Gierke, was as familiar to medieval thought as a mechanical and atomistic construction was originally alien to it. "Under the influence of Biblical allegories, and the models set by Greek and Roman writers, the comparison of mankind at large and every smaller group to an animate body was universally adopted and pressed."<sup>22</sup> In line with the statement of St. Paul that the church was a mystical body whose head was Christ, the ecclesiastical party maintained that the pope as the vicar of Christ on earth was this head ; the imperialist party on the contrary maintained that the emperor was the head. It resulted from the conflict of

<sup>20</sup> "De Republica," bk. IV. Cf. also Aristotle, "Politics," Jowett's ed., p. 113; and Barker, "Political Thought of Plato and Aristotle," pp. 127, 138, and 276 ff. The comparison of the state with the human organism was a favorite subject of early poets and prose writers. See Shakespeare, "Julius Caesar," II. i ; St. Paul, Romans xxii. 51 ; also I Cor. xii. 12. <sup>21</sup> "De Republica," III. 25.

<sup>22</sup> "Political Theories of the Middle Age" (translation by Maitland), p. 33.

opinion that there was a "two-headed monster, an *animal biceps*," to avoid which some contended that there were two bodies, each with its own head, both being part of a greater body whose head was God.<sup>23</sup>

Among later writers both Hobbes and Rousseau drew analogies between human beings and their artificial conventionally created states. Hobbes characterized the state as "that great *Leviathan* which is but an artificial man, though of greater strength and stature than the natural." He compared the sovereignty of the state to the soul of man, magistrates to joints, reward and punishment to nerves, etc. He even drew an analogy between the weaknesses of the state and certain human diseases such as "defectuous procreation," boils, pleurisy, etc.<sup>24</sup> Rousseau compared the "body politic" to the "human body," both of which he said possessed the "motive powers" of "force" and "will" (the legislative power and the executive power). The former was the "heart" of the state; the latter its "brain."<sup>25</sup>

**Development of the Theory in the Nineteenth Century.**—The earlier conceptions were little more than superficial analogies or comparisons; for the most part those who drew them were advocates of the contract theory of the origin and nature of the state, a theory which was hardly compatible with the organic theory as it came later to be expounded and defended. The reaction against the eighteenth-century theory of the social contract, which took place in the early part of the nineteenth century, found embodiment in the organic theory, which, it was believed, offered a substitute more in accord with the real nature of the state and with the true relation existing between it and the individuals who compose it.<sup>26</sup> The new theory took root in German soil and there it found its most notable advocates. Among the earlier of these writers who enunciated the theory in one form or another were Leo, Schelling, Krause, Ahrens, Smithenner, Waitz, Görres, Volgraff, Stahl, Zicharia, Frantz, and others.<sup>27</sup> The fascination of the theory with its biological analogies and parallelisms became so widespread that political science, for a time,

<sup>23</sup> Gilchrist, "Principles of Political Science" (1920), p. 49.

<sup>24</sup> See his Introduction to "The Leviathan," "Works," vol. III, pp. ix-x.

<sup>25</sup> "The Social Contract," bk. III, chs. 1, 11.

<sup>26</sup> Compare Merriam, "History of the Theories of Sovereignty since Rousseau" (1910), pp. 47 ff., and Gettell, "History of Political Thought" (1924), p. 400.

<sup>27</sup> Their views are explained by Coler, "Organismic Theories of the State" (1910), pp. 20 ff. See also Schulze, "Deutsches Staatsrecht," vol. I, pp. 20-23.

seemed in danger of being swallowed up by natural science. The culmination of the theory was reached in the writings of the noted Bluntschli, between 1852 and 1884,<sup>28</sup> who exaggerated it beyond that of all his predecessors. The state, he declared, is the very "image of the human organism."<sup>29</sup> Each has its member parts, its organs, its functions, its life processes, and between those of the state and human organisms there exists a deep and striking resemblance. He pushed the biological analogy so far indeed as to impute sexual qualities to the state, it being personified as masculine in character as contradistinguished from the church, to which he assigned the attribute of femininity.<sup>30</sup> His comparison of the structure and life process of the state with those of the human body was extremely fantastic and even absurd. The state, to him, was "no mere artificial lifeless machine," but a "living spiritual organic being." As an oil painting, he said, is something more than a mere aggregation of drops of oil, as a statue is something more than a combination of marble particles, as a man is something more than a mere quantity of cells and blood corpuscles, so the nation is something more than a mere aggregation of citizens, and the state something more than mere collection of external regulations.<sup>31</sup>

**Spencer's Analogies.**—While the organismic theory in its modern form originated among the Germans and found among them its most numerous and eloquent votaries, it had some supporters in England, Austria, Russia, and France.<sup>32</sup> In England Herbert Spencer adopted the theory and in his "Principles of Sociology" (1878-1880) and other writings, applying the methods of the new science of biology, he drew an elaborate analogy between society and a natural organism.

<sup>28</sup> "Allgemeine Staatslehre" (1852), later expanded into his larger "Lehre vom modernen Staat"; "Gesammelte Schriften"; and "Psychologische Studien über Staat und Kirche" (1884). <sup>29</sup> "Psychologische Studien," p. 22.

<sup>30</sup> *Ibid.*, p. 39; also his "Allgemeine Staatslehre," bk. I, ch. 1.

<sup>31</sup> "Allgemeine Staatslehre," p. 192; "Theory of the State," p. 18, and the review in Coker, pp. 104-114.

<sup>32</sup> Treitschke was one of the few German writers who criticized the organismic theory. It is he said "obviously misleading to look upon the state as an organism as many theorists do." It was dangerous, he added, to treat it as a natural organism and to import the terminology of natural science into political science. Besides, the boundary between organic and inorganic life could not be clearly drawn and the calling of the state an organism did not express its nature. "Politics," vol. I, p. 18.

Society he conceived to be a natural organism differing in no essential principles from other biological organisms. Both the animal and social bodies, he affirmed, begin as germs, undergo a process of continuous growth, the parts, as they develop, becoming more and more unlike, and exhibiting greater complexity of structure. As the lowest type of animal is all stomach, respiratory surface, or limb, so primitive society is all warrior, all hunter, all hut builder, or all tool maker.<sup>33</sup> As society grows in complexity, division of labor follows, i.e., new organs with different functions appear, corresponding to the differentiation of functions in the animal, in which "fundamental trait" they become "entirely alike." In each case there is a mutual dependence of parts, the full performance of the functions of each member being essential to the health and preservation of the rest. If the iron worker in the social organism stops work, or the miner, or the food producer, or the distributor fails to discharge his natural functions in the economy of society, the whole suffers injury just as the animal organism suffers from the failure of its members to perform their functions. Thus the "parallelism between social and animal life" is maintained. The slow but constant replacement of cell tissue and blood corpuscle in the animal organism, by which it is destroyed and reproduced again, we are told, is paralleled by the processes in society, by which it is permanently maintained, notwithstanding the deaths of the component members.<sup>34</sup> Spencer attributed to both the animal organism and the social body a "sustaining system" consisting of alimentation in the former, and production in the latter; a "distributing system" consisting of the circulatory apparatus in the human body, and the transportation system in society; and a "regulatory system," consisting of the nervous system in the animal, and of governments and armies in the state.<sup>35</sup>

In spite of all these elements of resemblance, Spencer admitted, however, that there is one "extreme unlikeness" in the structure of

<sup>33</sup> Vol. I, pt. II, sec. 217.

<sup>34</sup> *Ibid.*, sec. 217, also chs. 3 and 4.

<sup>35</sup> *Ibid.*, chs. 7, 8 and 9. In the *Westminster Review*, in 1860, Spencer published an essay in which he drew a parallel between the up and down lines of a railway, which furnishes the circulation of commodities in the social organism, and the arteries and veins of an animal, money being the blood corpuscles and the telegraph wires the nerves. I am unable to find any allusion to this parallel in his collected works, from which it seems to have been wisely omitted.

the body politic and that of the animal organism. The latter, he said, is *concrete* in structure, that is, its units are bound together in close contact; while the social body is *discrete*, its units being free and "more or less widely dispersed."<sup>36</sup> He readily admitted that the difference was "fundamental," though, he said, "upon close examination it will not put comparison out of the question," for it can be shown that "the social aggregate, though discrete, is still a living whole."<sup>37</sup> There is still another difference between the two organisms, he added, which "greatly affects our notion of the ends to be achieved by social organization," namely, the lack of a "nerve sensorium" in the social body. In the animal, consciousness is concentrated in a small part of the aggregate; in the social organism, it is diffused throughout the aggregate. The conclusion of practical politics which Spencer drew from the failure of the analogy at this point was that the welfare of the aggregate in society, considered apart from that of the units, is not an end to be sought; that, in short, society exists for the benefit of its members, not its members for the benefit of society.<sup>38</sup> Upon the dissimilarity which he found between society and the biological organism, or rather upon the discrete nature of the social organism, he built up his individualistic political philosophy, which has seemed to some to be wholly inconsistent with his organic theory of the state.<sup>39</sup>

**Other Advocates of the Organismic Theory.**—The Austrian publicist Albert Schäffle was another writer who greatly overworked the biological analogy. In four large volumes entitled "The Structure and Life of the Social Body" ("Bau und Leben des sozialen Körpers," 1875-1878), he emphasized at great length the anatomical, physiological, biological, and psychological resemblances between society and the animal body, and asserted that society is an organism whose protoplasm or unit is man, the state or government in the one corresponding to the brain in the other. His work as a whole exhibits evidence of

<sup>36</sup> *Ibid.*, sec. 220.

<sup>37</sup> *Ibid.*, sec. 221.

<sup>38</sup> *Ibid.*, sec. 222.

<sup>39</sup> Compare Ritchie, "Principles of State Interference," p. 17. Spencer's denial of the existence of a "nerve sensorium" in society was probably the result of his individualistic thinking. After his long argument in support of the organic theory of society, it seemed necessary to reconcile his biological theory with his doctrine of individualism by showing that after all there is a difference and that the parts are not dependent on the whole, as they are in the case of the animal organism.

enormous learning and wide research, and the theory of the organic nature of society was supported with ability and ingenuity.<sup>40</sup> Of a similar character and magnitude was the work of Paul Lilienfeld, a Russian sociologist, whose "Thoughts concerning the Social Science of the Future" ("Gedanken über die Socialwissenschaft der Zukunft"), published in five volumes between 1873 and 1881, constitutes an elaborate exposition of the organic theory, including the laws of social psychology and social physiology. He went even beyond Spencer and Schäffle in the emphasis which he placed on the organic character of society, and in his advocacy of the biological analogy.<sup>41</sup> Among others who have explained and defended the organic theory may be mentioned the French writers Auguste Comte,<sup>42</sup> Fouillée,<sup>43</sup> and René Worms.<sup>44</sup> Of these the French sociologist Worms is to-day probably the most eminent advocate of the organic theory. In his "Organism and Society" he expounds and defends the biological analogy, maintaining that the anatomy, physiology, and pathology of society possess striking similarities to the structure, function, and pathology of living beings.<sup>45</sup>

**Evaluation of the Organismic Theory.**—If the organicistic theory meant simply that the state is something more than an aggregation of individuals crowded or massed together without any unifying bond,—in other words, that it is a society in which the members individually are in a peculiar sense dependent upon the whole and the whole in turn is conditioned upon the parts,—no well-grounded objection to it could be sustained.<sup>46</sup> Even the biological analogy up to a certain point, though subserving little or no practical purpose, is harmless and

<sup>40</sup> Compare Leroy-Beaulieu, "L'état moderne et ses limites," ch. 4.

<sup>41</sup> For a statement of the difference between their conceptions see the preface of René Worms to Lilienfeld's "La pathologie sociale," p. vii. In the latter work Lilienfeld continues his study of the organic nature of society, considering in particular such topics as the "maladies of the social organism," its "nervous system," the "pathology of society," "social therapeutics," etc.

<sup>42</sup> "Positive Philosophy" (6 vols., 1830-1842), vol. II, ch. 3.

<sup>43</sup> "La science sociale contemporaine" (1880).

<sup>44</sup> "Organisme et société" (1896).

<sup>45</sup> See especially ch. I. The conceptions of Comte, Bluntschli, Spencer, Schäffle, Lilienfeld, Fouillée, and Worms are well analyzed by Coker, *op. cit.*, pp. 104 ff.

<sup>46</sup> Compare Hobhouse, "Liberalism," pp. 125-131; also his "Social Evolution and Political Theory" (1911), p. 87, where he observes that "to speak of society as if it were a physical organism is a piece of mysticism, if indeed it is not quite

scientifically unobjectionable, for manifestly there are certain elements of resemblance between the structure and functions of the state on the one hand and those of living beings on the other. But at many points the comparison utterly fails and the resemblance becomes pure fancy. Thus the resemblance between the cells of a biological organism and the human beings who constitute the body politic will be seen upon close examination to be exceedingly superficial. The former are mechanical pieces of matter, with no independent life of their own, each being fixed in its place, having no power of thought or will, and existing solely to support and perpetuate the life of the whole; the latter are intellectual and moral beings, each having a will of its own, possessing the power of foresight, movement, and self-control, and a physical life independent of the whole of which they are a part. Each individual has to a large extent the shaping of his own life; and his place in the organism is not determined for him nor are his activities wholly regulated by the state. This lack of consciousness and will on the part of the cells of the animal organism and its presence in the state organism is one of the instances where the analogy fails. With the plant or animal organism the dependence of the parts on the whole is essential, and the relation intrinsic; if they are severed from their connection, as a branch from a tree or a limb from an animal, they perish and cease to be living matter. With the state, on the contrary, the separation of a member does not result in destruction, physically speaking; the individual separated from the whole is still an individual.<sup>47</sup> Moreover, the laws of growth, development, decay, and death which govern the life of the human organism are scarcely analogous

meaningless." "But," he adds, "the life of society and the life of an individual do resemble one another in certain respects, and the term 'organic' is as justly applicable to the one as to the other, for an organism is a whole, consisting of interdependent parts. Each part lives and functions and grows by subserving the life of the whole. It sustains the rest and is sustained by them, and through their mutual support comes a common development."

<sup>47</sup> Compare Mackenzie, "Introduction to Social Philosophy," p. 138. See also LeFur's criticism of the organicism theory in general and of Spencer's analogies in particular (*op. cit.*, 218 211). Referring to the analogy between the cells of a biological organism and the units of society, he calls attention to one curious difference which appears to have escaped Spencer's notice, namely that a living cell cannot be a part of two distinct organisms at the same time, whereas an individual member of the pretended social organism may be a member at the same time of a great number of other societies or associations which constitute in themselves distinct organisms.

in any sense to those which reign in the world of politics. An organism grows and develops from within by internal adaptation, not by the addition from without of new parts ; while the state changes rather than grows, and does this, for the most part, by the process of formal alteration as a result of volitional power and conscious effort of the members. Its growth, if such it may be called, is largely the result of the conscious action of its individual members and is to a great extent self-directed. The elements of volition and of conscious effort do not enter into the growth of an organism ; it changes in obedience to the operation of blind mechanical forces of nature, the parts having no power to alter the direction of its growth or to add to its stature.<sup>48</sup> Indeed, as Jellinek remarked, growth, decline, and death are not necessary processes of state life though they are inseparable from the life of the organism.<sup>49</sup> The state does not originate or renew itself as a plant or an animal does. In fact, to quote Jellinek again, many modern states like the German Empire, Italy, and some of the Balkan commonwealths have owed their existence to the sword rather than to any cause that may be compared to the procreative or generative processes through which plants and animals come into existence.<sup>50</sup>

Our conclusion must be that the biological analogy, in the form in which it is usually stated, is not only fanciful and absurd, but even mischievous, and would not merit notice were it not relied upon by some respectable writers as the justification of an important theory concerning the relation of the state to the individual members composing it. Some of these biological comparisons are ingenious and well stated ; to many writers they have proved fascinating and seductive ; to others they have constituted the basis of an argument for a theory of the state which would sacrifice the individual to society. The organic

Let us observe further that if we pass from comparison to identification and say that the state is a person or veritable animal "because its roads and railways, and soon, perhaps, its balloons, correspond to our arteries and our veins, we shall experience the feeling that it is a defiance of all common sense" (p. 219).

Compare also Barker (*op. cit.*, p. 10), who remarks that "the state is not an organism, 'ut it is *like* an organism ; it is not an organism because it is not a physical structure.'

<sup>48</sup> Compare Willoughby, "Nature of the State," p. 37, and Ward, "Psychic Factors of Civilization," p. 299.

<sup>49</sup> "System der subjektiven öffentlichen Rechten," p. 40.

<sup>50</sup> "Recht des mod. Staates," p. 149.

theory, in the sense in which it is understood by many writers, rests on mere analogy, and we should do well to heed Lord Acton's warning about analogies, metaphors, and parallelisms lest we come to grief. For this reason Jellinek suggested that we had better reject the theory *in toto* lest the danger from the large amount of falsity in the analogy should outweigh the good in the little truth which it contains.<sup>51</sup>

**Value of the Theory.**—Nevertheless, the theory has not been without a certain value. It served as an antidote to the eighteenth century individualistic doctrine that the state is a mere artificial mechanism, the materials of which, as Burke said, can be collected from any quarter and put together on any principle that the architect may think.<sup>52</sup> It emphasized the unity of the state, the interdependence of the individuals who compose it, and the impossibility of civilized life in isolation apart from society. It taught that the state "is not the hasty product of a day, but the well-ripened fruit of wise delay"; that it is a growth which, like a plant or an animal, has formed itself by slow degrees rather than by art and that the individual can no more separate himself from it than a leg can be severed from the body or a limb from a tree and still maintain its life.<sup>53</sup> Its chief weakness lay in its exaggeration

<sup>51</sup> For criticism of the organic theory see Jellinek, "Recht des mod. Staates," p. 142 ff.; Leroy-Beaulieu, *op. cit.*, ch. 4; Mackenzie, "Introduction to Social Philosophy," ch. 3; Schulze, "Deutsches Staatsrecht," I, 22-23; Leacock, "Elements of Political Science," pp. 80-82; Willoughby, "Nature of the State," ch. 3. Worms, in his "Organisme et Société," ch. 2, examines and answers the various objections to the organic theory. Professor Ernest Barker ("Political Thought from Spencer to the Present Day," pp. 106 ff.) points out that to suggest a parallel between two things is not to determine the relation between them, and that the more you labor the parallel the more you forget to determine the relation. Criticizing Spencer, who "faced the problem but instead of solving it hid his head in the sands of metaphor," Barker says: "Spencer is the classical instance of the labor and the forgetting. In the second place, if you seek to establish a parallel, it is necessary to be clear about the two terms of the parallel. If you compare two organisms, you must be clear about both. Spencer is clear about the individual organism, which is obviously physical; he is by no means equally clear about the social organism." Again, referring to the adoption by Spencer of the organic conception of the state, Barker observes: "The adoption seems whole-hearted: it is illustrated by a wealth of analogy whether between Protozoa and Bushmen, or between nerve trunks running by the side of the arteries and the telegraph-wires which run by the side of railways. But the adoption is only secured at the cost of a sacrifice of the unity of the organism."

<sup>52</sup> "Reflections on the French Revolution."

<sup>53</sup> Compare Vaughan, "History of Political Philosophy" (1925), vol. II, p. 24.

and in the fact that it rested upon analogies which were often superficial or false.

### III. THE CONTRACT THEORY

**The Theory Explained.**—As stated above, the organismic theory represented in part a reaction against the so-called contract theory which dominated the political thought of the eighteenth century. This theory must now be explained. In the minds of its votaries it often assumed two forms : first, it offered an explanation of the origin of the state ; second, it was a theory of the relation between those who govern and those who are governed. Those who adopted and expounded it as a theory of the origin of the state assumed the existence of a primitive, pre-civil (some maintained that it was also a pre-social) condition of mankind, escape from which was effected by means of a contract, pact, or covenant, express or tacit, between each individual and his fellows, by which each surrendered his "natural" right to do as he pleased and received in exchange "civil" rights ; that is, rights created and protected by the state. This pre-civil condition of society was described as the original state of nature.

According to Hobbes the rights of men living in this condition were limited only by their physical power ; there were in fact no such things as right or wrong, no justice or injustice, and no property, since all these are creations of the state. Naturally selfish, egoistic, brutal, covetous, and aggressive men were, potentially at least, in a perpetual state of war each with all. According to Locke's conception, on the contrary, men in the state of nature were naturally sociable, altruistic, and peaceable. Moreover, the state of nature was not a lawless state : men in fact were bound by that vague, indefinite thing called "natural law" or the "law of nature," the existence of which was generally recognized by jurists prior to the nineteenth century, although it was denied by Hobbes. That law, said Locke, was plain and intelligible to every reasonable creature, but the "inconvenience" lay in the fact that each man was necessarily the judge as to what it permitted and what it forbade and he was also the "executioner" of the law. In

these circumstances there was need of a common judge to interpret the law and a superior authority to enforce it, considering that men are biased and not therefore competent judges in their own cases.

**Nature of the Contract.**—Whatever the difference of opinion among the philosophers as to the actual character of the state of nature, they were all in accord that it was an unsatisfactory condition of society,<sup>54</sup> and that the only means of escape was through covenant. As to the nature of the transaction, the philosophers who defended the theory held different opinions. According to Hobbes each individual agreed with all the others to surrender his right to govern himself, to some particular man or assembly. By doing this they established the state, and the person or assembly upon whom they had bestowed their power was the sovereign of whom they were subjects.<sup>55</sup> Locke, on the other hand, wishing to justify the principles of the English Revolution of 1688 as Hobbes had wished to justify the absolutism of the Stuart kings, maintained that the surrender of rights was to the community and not to any man or assembly. According to Hobbes, the king was not a party to the contract and was not therefore bound by it; according to Locke, on the contrary, the people rather than the king was the sovereign, and the latter might forfeit his office by violation of the terms upon which he was vested with authority.<sup>56</sup> Rousseau's idea of the transaction was essentially the same as that of Locke. Each individual "puts his person and faculties into a common stock under the direction of the general will"; "each man giving himself to all, gives himself to none"; "what he loses by the social contract is his natural liberty and an unlimited right to anything that tempts him which he can obtain; what he gains is civil liberty and the ownership of all that he possesses."<sup>57</sup>

**Rejection of the Contract Theory.**—This theory, in one form or another, of the origin of the state was supported by a long line of philosophers, jurists, political writers, and even poets, beginning with

<sup>54</sup> Rousseau appears to have been an exception, since in his early writings, at least, he pictured the state of nature as an idyllic state, a sort of Arcadian paradise in which men were happy, care free, and peaceable. See the summary in Tozer's introduction to his English translation of "The Social Contract," pp. 29 ff.

<sup>55</sup> See his "Leviathan" (1651), ch. 17.

<sup>56</sup> Locke's theory is set forth in his "Two Treatises on Government" (1689).

<sup>57</sup> "The Social Contract" (1762), bk. I, chs. 6, 8.

the monarchomachs of the sixteenth century and including, in addition to Hobbes, Locke, and Rousseau, such well-known writers as Hooker, Milton, Grotius, Pufendorf, Wolff, Suarez, Kant, Blackstone, Spinoza, Fichte, and many others. But in the latter part of the eighteenth century and in the nineteenth century it was attacked by such writers as Hume, Bentham, Burke, Von Haller, Austin, Lieber, Woolsey, Maine, Green, Bluntschli, Sir Frederick Pollock, and others. All of them pointed out that the theory had no historical foundation<sup>58</sup> and that it was untenable on grounds of philosophy and reason, since it presupposed the existence of a political consciousness in the minds of men living in the state of nature,—a consciousness which they do not possess. By some writers, like Maine, it was pronounced to be "worthless"; others, like Green, pronounced it to be a "fiction"; Woolsey declared it to be "utterly false"; Bentham dismissed it as a "rattle" for amusement; while Sir Frederick Pollock characterized it as one of the "most successful and fatal of political impostures."<sup>59</sup> As an explanation of the origin of the state the theory is now entirely discredited, like various other early political doctrines, and no reputable philosopher or political writer could be found to defend it.<sup>60</sup>

<sup>58</sup> The constitution of Massachusetts (1780), which asserted "that the people have entered into an original, explicit, and solemn compact with each other," is sometimes cited as furnishing the historical proof; but in reality it was only an empty declaration, not the record of a historical fact. The "Mayflower Compact" of Nov. 11, 1620, by which 101 emigrants to America, before landing, entered into an agreement whereby they "solemnly and mutually, in the presence of God and of one another, covenanted and combined themselves together into a civil body politic for their better ordering and preservation" has also been cited as example of the original contract. But upon examination this, as well as the other instances relied upon the advocates of the theory, will be seen to be no example of the founding of a new commonwealth by men in a state of nature, but merely the transplanting to new lands of political institutions by men already subject to political authority. Indeed, in the case cited above, the transaction was nothing more than the extension of an already existing state to a country not yet inhabited by civilized races. The Mayflower covenanters, in fact, expressly acknowledged that they were "loyal subjects" of an existing sovereign.

<sup>59</sup> For the history and forms of the theory in detail, and many citations to the literature, see my "Introduction to Political Science" (1910), pp. 92 ff.

<sup>60</sup> Compare Carré de Malberg, *op. cit.*, vol. I, p. 52; LeFur, "L'état, la souv. et le droit," pp. 10, 20; and Orlando, "Principes de droit public const." (French trans., p. 12), who reject the theory also because, as they maintain, men are incapable of living otherwise than in society and because there is no evidence that they have ever done so. The state, as Carré de Malberg observes (p. 54), is not the result of a conventional arrangement between individuals, but of forced sub-

**The Theory of the "Governmental" Contract.**—Nevertheless some of those who reject the theory as an explanation of the origin of the state, maintain that it is valid as an explanation of the relation between those who govern and those who are governed. While there may be no well-authenticated historical examples of a formal contract or covenant entered into between the people and their rulers, such an agreement or understanding, it is argued, exists by implication in every democratically governed state. The sacrosanct doctrine that governments derive their just powers from the consent of the governed, and that peoples have an inalienable right of revolution against governments and rulers who violate the conditions upon which they have been entrusted with the power of government, rests, it is said, upon the principle that there is an implied contractual relation between those who have been so invested with power and those who have conferred it. There is, in short, a reciprocal obligation upon both parties : an obligation on the part of the one to govern in accordance with the terms of the grant and to furnish that protection for the guarantee of which the state was in large part established ; an obligation on the part of the others to render obedience, and where necessary, service to the duly and legally established authorities. If, therefore, one party defaults in the performance of the obligation, the other is released from the duty of performance.

**Evaluation of the Theory.**—In this sense the doctrine of contract is more defensible, although the terminology is not entirely satisfactory, since the employment of the word "contract" may lead to

mission to social exigencies which they are powerless to elude. Compare Le Fur ("L'état fédéral," p. 567), who remarks that "the state, like the family, is necessary to society and like it is not the result of a contract but rather of the force of things." Compare also Esnlein ("Droit const." 5th ed., 1909, p. 232), who characterizes the theory as a "juridical fiction." It is, he says, unsustainable, first, because it sacrifices the right of the individual, since it involves an alienation of himself and his rights for the benefit of the community, and second, because it makes the right of the individual rest upon a primitive and absolute independence resulting from a state of nature, which with the social contract are historical hypotheses contrary to the facts of history and of sociology. See also Duguit, "Droit const." (1911), vol. 1, p. 13, who rejects the theory as an "unsustainable hypothesis" because it assumes that the idea of contract could be present in the minds of man in the so-called state of nature, which he says is impossible since men who are not already living in society cannot have any notion of contractual relations and obligations.

implications which are both false and dangerous. Thus if the state is merely the result of contract it might be argued that since the whole idea of contract implies a voluntary relation, any individual is free to become a party to it or to remain outside in a state of outlawry, as he may elect, just as one is free to become a member of a business partnership or not as he pleases--a proposition which of course cannot be admitted. Furthermore, it might be equally argued that the contract is binding only upon the original parties and not upon their successors who have never given their adherence to it. In that case the state would expire with the death of the original parties and would have to be renewed by their successors. To hold that the original contract is perpetually binding not only upon the original parties but upon future generations who have never consented to the agreement would be in the face of the principle that a contract is binding only upon those who have voluntarily entered into it. Thus the contract theory tends to make the state a matter of caprice, and if followed out to its logical conclusion it would lead to the subversion of all authority and possibly the dissolution of the state.<sup>61</sup>

**Conclusion.**—The only tenable conclusion is that membership in the state and the obligations of allegiance and obedience cannot be interpreted in the terminology of legal contract. We can no more explain them on the theory of contract than we can account for the membership of a child in the family or its duty of obedience to the parent, on the principle of consent. These relations rest upon utility, and the general interests and necessities of society; they are independent of consent and they are entered into without any more thought as to their justification or legal basis than one bestows upon the principle of gravity or the operation of the laws of nature in general.<sup>62</sup>

Finally, the contract theory tends to reduce the state to the level of a partnership or joint stock company—an artificial creation rather than

<sup>61</sup> Cf. Jellinek, *op. cit.*, p. 208; Bluntschli, *op. cit.*, bk. IV, ch. 9; McKechnie, "The State and the Individual," p. 33; Woolsey, "Political Science," vol. I, p. 191; Hume, "Of the Original Compact," "Works," vol. I, pp. 116 ff.; Willoughby, "Nature of the State," p. 125; and Lieber, "Political Ethics," vol. I, pp. 283-294.

<sup>62</sup> The German writer Von Haller, one of the earlier critics of the contract theory, declared that it would be as logical to speak of a contract between an individual and the sun that the latter would warm him, as to speak of a covenant between the individual and the state. Quoted by Merriam, *op. cit.*, p. 65.

the product of historical growth and social necessity. It was against such a view of the state that Burke directed the most eloquent of his attacks, in which he said society was something more than "a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and then dissolved by the fancy of the parties." The consent, he said, upon which the contract theory rested was in fact no true consent at all, and the assumed contract, so far from being a matter of choice, was imposed by the necessities of man's nature.

It would be impossible, says an eminent political philosopher, to define the ends of the state more nobly or more completely than did Burke in this partly quoted passage, and he adds that it "would be equally impossible to define them in a sense more absolutely opposed to the external and limited aims assumed by the individualists."<sup>63</sup>

The contract theory, however, like the organicist theory, served a useful purpose in its day by providing a weapon for combating irresponsible rulers and a justification for resistance to tyranny. Out of it there developed the doctrine that kings derived their authority from the people, were responsible to them, and could be deposed for breaking the pact which they were assumed to have entered into at the time of their coronation.

#### IV. THE IDEALISTIC OR METAPHYSICAL THEORY

**Statement of the Theory.**—The idealist theory of the state, sometimes called the *absolute* theory, sometimes the *philosophical* theory, often the *metaphysical* theory, is said to have had its origin in the doctrine of Plato and Aristotle that the state alone is self-sufficing and that in it alone is the individual capable of living the good life and of realizing the highest ends of his existence.<sup>64</sup> Out of his incontrovertibly sound doctrine was developed a philosophy which idealizes the state and glorifies it almost to the point of deification; which tends to regard it as an end rather than a means; which treats it as omnipotent and omnicompetent; which places it upon a pedestal at the foot of which its members are expected to bow down and worship

<sup>63</sup> Vaughan, "History of Political Philosophy" (1924), vol. II, p. 54.

<sup>64</sup> Compare Joad, "Introduction to Modern Political Theory" (1924), p. 10.

it ; which teaches that it can do no wrong and that whether good or bad its authority must be obeyed without question, and that resistance to its commands or revolt against its authority, however, oppressive or unjust, is wicked and iniquitous. Furthermore, it regards the state as having an existence apart from the people who compose it ; it is a mystical, super-personal entity above the nation organized ; it possesses a will, rights, interests, and even standards of morality of its own, separate and distinct from those of individuals or even of the sum of individual wills ; and it, rather than individual enterprise and effort, is the real source of all civilization and progress.

This is, in substance, the idealistic or metaphysical theory, at least as it has been expounded by some of the political philosophers with whose name it is commonly associated, and by some militarists who are commonly reckoned as being their disciples. The "father" of the idealistic theory was the German philosopher, Immanuel Kant, although some would bestow that distinction upon his successor, Hegel. Kant's doctrine is found mainly in his "Metaphysical First Principles of the Theory of Law" (1796).<sup>65</sup> He maintained that the state is omnipotent, infallible, and divine in essence, and that all its authority comes from God ; that obedience to its authority is a sacred duty, even though that authority is illegitimate and in the hands of a usurper—that obedience being due because the state realizes a holy and divine idea. Kant's horror of revolution was so great that "he preached a stagnation," says Vaughan, "which even Burke would have regarded as excessive."<sup>66</sup> Yet when revolution occurred and a legitimate government was displaced by one established through violence, so superstitious was his veneration for established authority that he considered obedience to it a duty because, although founded on revolution, it "realized the idea of the state." Indeed, citizens and subjects ought not to inquire too closely into the question of legitimacy ; their duty is not to doubt or question the legality of established authority but to obey it blindly and implicitly.

<sup>65</sup> A portion of it has been translated into English by W. Hastie with the title "The Philosophy of Law" (1887). It is summarized by Dunning in his "Political Theories from Rousseau to Spencer" (1920), pp. 130-136 ; by Vaughan, "Studies in the History of Political Philosophy" (1924), vol. II, ch. 2 ; and by Duguit, "The Law and the State" (1917, translation by Slovère), ch. 3.

<sup>66</sup> *Op. cit.*, vol. II, p. 82.

**Hegel's Philosophy.**—But it was in the philosophy of Hegel that the idealistic theory reached its climax. He clothed it in language so abstract and metaphysical that it is difficult for an ordinary mind to understand it, and at times his subtle formulas provoke irritation and disgust in the mind of the reader.<sup>67</sup> His teaching exerted enormous influence, and critics of his philosophy are not lacking who attribute to it the responsibility for the World War.<sup>68</sup> The state he conceived to be "the reality of the ethical spirit" (*die Wirklichkeit der sittlichen Idee*), "the manifest self-conscious, substantial will of man, thinking and knowing itself and suiting its performance to its knowledge, or to the proportion of its knowledge." Again, the state is "perfected rationality," an "absolute fixed end in itself." As the state is "objective reason or spirit," the individual has real human objectivity and ethical quality only as a member of the state; in it alone is there a realization and actualization of his own larger freedom; its service is a ministry of freedom and its claims upon the individual are of the highest order. In the state man raises his outward self to the level of his inward self of thought. In brief, the state is man in his fullness and perfection of development. The state is an entity over and apart from the people who compose it, with a real will and personality of its own, which will is the "general will" and not the sum of individual wills. It followed that the action of the state in so far as it proceeds from

<sup>67</sup> His political philosophy is found mainly in his "Grundlinien der Philosophie des Rechts," 1821, being vol. VIII, of his complete works. There is an English translation by Dyde under the title, "Hegel's Philosophy of Right" (1896), and another by Morris, entitled "Hegel's Philosophy of the State and History" (1887). Analyses of his philosophy may be found in Dunning, *op. cit.*, pp. 154-166; in Vaughan, *op. cit.*, vol. II, ch. 4; in Duguit, *op. cit.*, ch. 5; Joad *op. cit.*, pp. 11-17; and in Hobhouse, "The Metaphysical Theory of the State" (1918).

<sup>68</sup> Compare the following from a letter of Professor L. T. Hobhouse to his son, referring to Hegel's "Philosophy of the State." "In the bombing of London I had just witnessed the visible and tangible outcome of a false and wicked doctrine, the foundations of which lay, as I believe, in the book before me. To combat this doctrine effectively is to take such part in the fight as the physical disabilities of middle age allow. Hegel himself carried the proof sheets of his first work to the printer through streets crowded with fugitives from the field of Jena. With that work, began the most penetrating and subtle of all the intellectual influences which have sapped the rational humanitarianism of the eighteenth and nineteenth centuries, and in the Hegelian theory of the god-state all that I had witnessed lay implicit." "The Metaphysical Theory of the State" (1918), p. 6. Compare also Levy-Bruhl, "L'Allemagne depuis Leibniz," p. 399.

the general will must necessarily be infallibly right in the sense that it represents what is best in individual wills. Having a real personality of its own, the state may be regarded as an end in itself, and possesses rights which necessarily, in case of apparent conflict, override the "so-called" rights of the individual. "So-called" because the individual can have no *real* rights which conflict with those of the state, since his rights are derived from the state.

From these premises three somewhat paradoxical results follow: first, the state can never act unrepresentatively; whatever it does is an expression of the real will of individuals, even if it be the arrest by a policeman of a thief; second, the bond which binds the individual to his fellows and to the state forms an integral part of the individual's personality; third, the state contains within itself, and represents, the social morality of all its citizens; it is the "realization of the moral idea." This does not mean that the state is itself moral or is bound by rules of morality either in its relations with individuals or with other states.<sup>69</sup> On the contrary, it is bound neither by principles of morality nor by those of international law; in fact there is no such thing as international law, since there is no power superior to the state which can lay down rules which are binding upon it. From these conclusions it is but a short step to the absolutism and omnipotence of the state and the sacrifice of the individual—a step which Hegel did not hesitate to take. But after all, he argued, the benefit outweighs the loss because it is only in the state that the individual obtains his full liberty, attains his morality, and realizes his rights. He has nothing therefore to fear from its absolutism. There is a halo of divinity about it; whether it is good or bad—if it can be bad—it is indeed the march of God in the world (*es ist der Gang Gottes in der Welt das der Staat ist*). "It is the divine idea as it exists on earth"; "it is the divine will as the present spirit unfolding itself to the actual shape and organization of the world."<sup>70</sup> Thus the state to Hegel is a "God-state," incapable of wrong, infallible, omnipotent, and entitled to every sacrifice which its interests may require of the

<sup>69</sup> As to these deductions compare Joad, *op. cit.*, pp. 13-14.

<sup>70</sup> See his "Philosophie des Rechts," pp. 312-13; 327. "It is the absolute power upon earth"; "it is its own end"; "it is the ultimate end which has the highest right against the individual whose highest duty is to be a member of the state" (*ibid.*, pp. 306, 417).

individual. By virtue of its transcendent character and of the sacrifice and devotion which it has a right to demand, it elevates and ennobles the individual, whose tendency is to become selfish and self-centered and "carries him back into the life of the universal substance."

**Hegel's Disciples.**—The Hegelian conception of the state, at least certain of its elements, found adherents in various later German political writers and militarists, notably Nietzsche, Treitschke, and Bernhardi.<sup>71</sup> All three taught the indispensability and even the nobility of war; they deified and apotheosized the state; they maintained that it sets its own standards of morality; that it is not bound by the rules of international law except in so far as it chooses to be bound by them; and that every state is itself the judge of its own international obligations, etc. Treitschke, who pronounced Hegel to be "the first real political personality"<sup>72</sup> among German political philosophers, maintained that no limits could be assigned to the sphere of the state; "it can obviously draw all human action within its power." He very nearly idolized Machiavelli, "the brilliant Florentine who was the first to declare distinctly that the state is power"; he himself over and over again emphasized that "the state is power"—a perfectly sound proposition—but he and his disciples drew the corollary: "therefore fall down and worship it."<sup>73</sup> The first duty of the state is to make itself strong and powerful; weakness in politics is the most abominable and contemptible of all sins against the Holy Ghost; the state must therefore be self-assertive, aggressive, militaristic, and a state with a superior civilization has a right and a duty to impose its civilization upon those less culturally endowed. As pointed out in an earlier chapter, he had a profound contempt for small states; he argued that the progress of all civilization is due to the state, and that the unaided effort of the individual amounts to little. Treitschke's

<sup>71</sup> See especially Nietzsche's "Zarathustra," Theitschke's "Die Politik," and Bernhardi's "World Power or Downfall."

<sup>72</sup> See the English translation of his work ("Politics"), vol. I, pp. 62, 63, 55, 84. The second "essential function of the state is war"; "without war no state could be"; "it is impossible to banish war from the world" nor would it be desirable; "the grandeur of war lies in the utter annihilation of petty man in the great conception of the state"; "it fosters the political idealism which the materialist rejects"; "the living God will see to it that war shall return again, a terrible medicine for diseased mankind" (p. 69); etc.

<sup>73</sup> Compare Jenks, "The State and the Nation" (1919), p. 153.

influence upon the political thought of his own generation was almost as great as that of Hegel in his day,<sup>74</sup> and those who place the responsibility for the great tragedy of 1914 upon Germany rightly or wrongly, find the root causes in his teaching and that of other German historians and political philosophers who shared his views.<sup>75</sup> It is only fair to Hegel, however, to state that his philosophy was far less brutal and materialistic than that of Treitschke and that many of the latter's conclusions can hardly be said to have had anything in common with the Hegelian philosophy.

**English Idealists.**—The pure idealistic conception of the state never took full root in the political philosophy of England or the United States, although a few English writers accepted it with important qualifications and reservations. Among these may be mentioned F. H. Bradley,<sup>76</sup> T. H. Green,<sup>77</sup> William Wallace, R. L. Nettleship, and especially Bernard Bohanquet,<sup>78</sup> whom Hobhouse characterizes as Hegel's "most modern and most faithful exponent." They followed Hegel rather than Fichte and none of them would have endorsed the teachings of Treitschke in regard to the omnicompetence and absolutism of the state. Nor did they even follow Hegel in his adulation of the state as the "March of God in the world" nor Kant in his horror of the right of revolution. Green, the most brilliant of the group, was a Kantian rather than a Hegelian; he taught that the power of the state was in fact limited within and without, and that "the life of

<sup>74</sup> Professor Paulsen said of him : "Among contemporary historians Treitschke has exercised the greatest influence upon the political thought of the rising generation." "Zur Ethik und Politik."

<sup>75</sup> Compare Willoughby, "Prussian Political Philosophy" (1918), pp. 48-49; "Why we Are at War," by members of the Oxford Faculty (1914), ch. 6; and Bryce and others, "The International Crisis: the Theory of the State" (1916). Professor Otto Hintze of the University of Berlin in a chapter entitled "Germany and the World Powers" in "Deutschland und der Weltkrieg" (1915, English translation by Whitelock under the title "Modern Germany," 1916), discussing the Prussian form of government, said : "It is a form of government which does not seek primarily the comfort and happiness of the individual, but rather the power and greatness of the state" (p. 15). The late Professor Eduard Meyer reproached the English for never speaking of their "state." They often, he said, speak of the "empire" and the "government," but not the state—the state, high above the clash of parties does not, he added, exist for them, as it does for the German people. Quoted by Rose, "Nationality in Modern History," p. 124.

<sup>76</sup> "Ethical Studies."

<sup>77</sup> "Principles of Political Obligation."

<sup>78</sup> "The Philosophical Theory of the State" (1st ed., 1890), and other works.

the nation has no real existence except as the life of the individuals composing the nation." He was a Hegelian only in emphasizing the moral value and majesty of the state, holding that it is the source and creator of individual rights, and that if the individual challenges its authority the burden of proof is on him to show that the state is wrong.<sup>79</sup> Bosanquet, who came the nearest among English writers to being a genuine Hegelian, likewise accepted Hegel's doctrine with important qualifications. He was in fact more of a Rousseauist than a Hegelian so far as his philosophical theory of the state was concerned. His conception of the nature and limits of state power was, like that of Green, largely negative in character.<sup>80</sup> He attached great importance to the development of a strong, self-reliant, responsible individuality; he emphasized the value of the state in removing obstacles to the development of that individuality and in the creation of individual opportunities; but he never went to the length of "feeding the individual into the maw of a Moloch called the 'state'."<sup>81</sup>

**Criticism of the Idealistic Theory.**—The idealistic philosophy of the Hegelians has been the object of vigorous attack, especially in late years, by many writers who pronounce it to be not only false but wicked and dangerous. In the first place there are those who belong to the "realistic" school, who denounce the "idealistic" theory as being purely abstract and metaphysical. The most eminent of these is M. Duguit, who attacks the theory particularly because it attributes to the state a personality of its own distinct from that of the nation organized, and, generally, because it teaches the doctrine of the omnipotence, absolutism, and divinity of the state. It also sacrifices the autonomy and independence of the individual to its all-embracing power, denying to him not only the inalienable right of revolution but even the right to question the legitimacy or moral rightfulness of the authority or conduct of the state. To M. Duguit the doctrine that the state is infallible, that it can do no wrong, that it is subject to no law except that of which it is itself the creator, that it is not even

<sup>79</sup> Compare the analysis of his idealistic philosophy in Barkar, "Political Philosophy from Spencer to the Present Day," pp. 59-60.

<sup>80</sup> See the observations of Barker, *op. cit.*, pp. 70 ff.

<sup>81</sup> See a recent defense of his political philosophy by Hoernlé in an article entitled "Bernard Bosanquet's Philosophy of the State," in the *Pol. Sci. Quar.*, vol. 34, pp. 609 ff.

bound by the moral law or the prescriptions of international law except in so far as it chooses to be bound, is false and iniquitous.<sup>82</sup> It is only just to the idealistic philosophers, however, to say that some of the doctrines which M. Duguit attributes to them are corollaries which he has himself drawn, rather than their own conclusions, and that some of them represent the extreme opinions of Nietzsche, Treitschke, and Bernhardi which the "idealists" would probably never have endorsed. Certainly they do not represent the more moderate opinions of the English "idealists."

A second group of critics include those who attack the philosophical reasoning and deductions of the idealists. They argue that the idealistic philosophy of Hegel and his followers is unsound, not in accord with the facts of state life, and that it leads to untenable and even dangerous results. Some attack the theory because it idealizes the actual state and attributes to it a degree of perfection which it is far from possessing ; they deny that any actual state approximates the standard of what a state ought to be.<sup>83</sup> To them, the state, as the idealist conceives it, "may be laid up in heaven but it is not established on earth." They reject the assumption of the identity of the state with society ; they deny that the will of the state necessarily represents the totality of the wills of the individuals who compose it ; that the state is therefore omnipotent ; that its conduct cannot be immoral or illegal ; that the state is rather an end than a means ; and that it has ends and interests which may be distinct from those of the totality of the citizens.<sup>84</sup>

The most brilliant and vigorous of the adversaries of the idealistic doctrine is Dr. L. T. Hobhouse, Professor of Sociology in the University of London, who in his "Metaphysical Theory of the State" (1918) subjects the philosophy of Hegel, Green, and Bosanquet, in particular, to a searching examination and criticism. "The theory, commonly spoken of as idealism, is in point of fact," he says, "a much more

<sup>82</sup> See especially his "Law and the State," pp. 145 ff. and 162 ff.

<sup>83</sup> Compare E. Barker, "The Superstition of the State," *Literary Supp. of the London Times*, July 18, 1918 ; also his "Political Thought from Spencer to the Present Day," pp. 80 ff.; and Hoernlé, article cited, p. 618.

<sup>84</sup> See a statement of the theoretical and practical objections to the theory by Joad, *op. cit.*, pp. 17-23. This author concludes that the theory is "inimical to individual freedom, because, whenever a conflict occurs between an individual and the state, it takes the view that the latter must inevitably be right."

subtle and dangerous enemy to the ideal than any brute denial of absolutism emanating from a one-sided science." It is a mistake to regard Hegel's exaltation of the state as merely the rhapsodical utterances of a metaphysical dreamer; his "false and wicked doctrine of the God-state" furnished the basis of "the most serious opposition to the rational, democratic humanitarianism of the nineteenth century." The Hegelian conception was designed "to turn the edge of the principle of freedom by identifying freedom with law; of equality, by substituting the conception of discipline; of personality itself, by merging the individual in the state; of humanity, by erecting the state as the supreme and final form of human association."<sup>85</sup> "It set up the state as a greater being, a spirit, a super-personal entity, in which individuals with their private conscience or claims of right, their happiness or their misery, are merely subordinate elements."<sup>86</sup> The doctrine that the individual has no value or life of his own apart from the state and no freedom unless it is "in conformity with law and custom as interpreted by the ethical spirit of the particular society to which the individual belongs," is the virtual negation of freedom.<sup>87</sup> "When we are taught to think of the world which we know as a good world, to think of its injustices, wrongs, and miseries as necessary elements in a perfect ideal, then, if we accept these arguments, our power of revolt is atrophied, our reason is hypnotized, our efforts to improve life and remedy wrong fade away into a passive acquiescence in things as they are; or, still worse, into a slavish adulation of the Absolute in whose hands we are mere pawns."<sup>88</sup> Adverting to the Hegelian glorification of the state, Professor Hobhouse concludes: "The state is a great organization. Its well-being is something of larger and more permanent import than that of any single citizen. Its scope is vast. Its service calls for the extreme of loyalty and self-sacrifice. All this is true. Yet when the state is set up as an entity superior and indifferent to component individuals, it becomes a false god, and its worship the abomination of desolation, as seen at Ypres or on the Somme."<sup>89</sup>

**Evaluation of the Idealist Theory.**—Practically all political writers to-day reject most of the Hegelian philosophy, especially the

<sup>85</sup> See pp. 6, 23.

<sup>86</sup> Page 27.

<sup>87</sup> Page 31.

<sup>88</sup> Page 19.

<sup>89</sup> Page 130.

doctrine of the absolutism of the state, its alleged divinity, the doctrine of blind and passive obedience to established authority when that authority is illegitimate and oppressive, and the doctrine that the state is an end in itself, a mystical super-personal entity, an incarnation of the Absolute, with rights and interests of its own separate and distinct from those of its citizens.

It has been said that Hegel himself in his servility to the Prussian monarchy confused it with the kingdom of heaven and that his philosophy was founded in the "dunghill of authority rather than upon science." It did not therefore represent the free and unbiased thought of an independent mind. Nevertheless, it may be said of much of the criticism which has been directed against the idealist theory that it is unfair, exaggerated, and based upon a misconception of the theory itself. In so far as the idealists exalted the state above all other human associations, regarded it as indispensable to the realization of the good life, and held that, as such, it is entitled to the loyalty of the citizen and may demand sacrifices of him to preserve its existence, that it is the sole source of law and of rights, that in it alone is the individual capable of realizing fully the ends of his existence, and that without it human progress and civilization would be impossible, the theory is entirely sound and irreproachable.<sup>90</sup> For the most part it is the perversions and unwarrantable deductions that have lately brought it into discredit.

As to the criticism that the theory idealizes things that are not and never can be perfect, the reply has been made that the criticism rests on a misconception of the true method of political theory. Like ethics, political theory is concerned with what *ought* to be as well as with what actually is; the real nature of a thing is what the thing is when its growth is fully developed; the political philosopher, therefore, may very properly idealize the state and deal with it in its imaginary splendor and perfection.<sup>91</sup>

<sup>90</sup> As thus understood the idealist conception is defended by Hoernlé, article cited pp. 624 ff. The idealists, he says, are "lovers of the state"; they are apostles of the religion of patriotism and loyalty and when they speak of the "realization of the ideal in the actual" they are merely employing the formula for every spiritual existence.

<sup>91</sup> Compare Barker, *op. cit.*, p. 80.

## CHAPTER XI

### FORMS AND TYPES OF STATES

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#### I. PRINCIPLES OF CLASSIFICATION

**Attempts at Classification.**—The apparent differences between states and the diversity of points of view from which they may be considered have led to numerous attempts to classify them. The literature dealing with the subject is very large, but on the whole it is unsatisfactory because the classifications which have been attempted too often rest upon no scientific principle by which states can be distinguished from one another in their fundamental characteristics. In their legal character, in their essence, and in their primary ends and purposes all states are essentially alike and cannot therefore be differentiated one from another in the same way that natural organisms, physical objects, or chemical elements may be distinguished. The things which differentiate one state from another are not differences of constituent elements but rather external phenomena or characteristics. The most important of these latter are the forms and character of their governmental organizations.

**Classification of States and Governments Confused.**—The most common and most satisfactory classification of states is therefore that which is based upon the similarities and differences of their governments. But in the last analysis such a classification is nothing more than a classification of *governments* and not of *states*. Modern political science and practice clearly distinguish between the two things, and consequently a classification of states on the basis of forms of government rests upon a confusion of the two. Consistency and scientific logic therefore require that such classifications be placed in their proper category and labeled as classifications of "governments" and not of "states." If that principle is departed from in the treatment of the subject here, it is in consequence of the desire to conform to popular usage and is not to be understood as an admission that such usage is scientifically correct.

**Some Traditional Classifications.**—On the basis of the forms, character, or spirit of their governments states have been classified as monarchies (absolute or limited), republics, aristocracies (natural, hereditary, elective), democracies (pure or direct, and indirect or representative), theocracies, despotisms, ochlocracies, timocracies, oligarchies, plutocracies, patriarchal states, feudal states, and others.

On the basis of their wealth, resources, military strength, and the influence which they exert in international relations they are classified as "great powers" or "world powers," "lesser powers," and "petty states."<sup>1</sup> With respect to the degree of their independence and autonomy they are classified as "sovereign," "part sovereign," "non-sovereign," "vassal," "protected," and "neutralized" states.

States have been classified on the basis of many other characteristics. Thus those which have seacoasts and large merchant marines have been classified as "maritime" powers; those which have no outlets upon the sea are classed as "landlocked" states; those whose territories are in the form of islands are classified as "insular" states; those which are territorially a part of a great continent are frequently referred to as "continental" states; those which have large armies are spoken of as "military" states and if their policies are aggressive, they are denominated "militaristic" or "imperialistic" states.

<sup>1</sup> See Oppenheim, "International Law" (3d. ed.), vol. I, pp. 188-190.

Professor Holcombe suggests that among the criteria which might be used as bases of classification are the rate of increase of population, wealth, and income, the amount of food and raw materials consumed, the degree of intelligence, etc. If a single criterion of well-being is chosen, the "most eligible," he says, "is probably the death rate." States may therefore be classified on the basis of their vital statistics. He further suggests that another objective classification—"a highly practical one in this capitalistic age"—is that which arranges them in accordance with the credit which their governments enjoy in the money markets of the world.<sup>2</sup>

The points of view from which states may be envisaged, the criteria by which they may be compared, and consequently the classifications which may be made of them, might be multiplied almost indefinitely, but it would serve little purpose. Classifications on the basis of governmental forms and organization, as stated above, are in the last analysis nothing more than classifications of government, and accordingly we leave the matter to be dealt with in connection with the discussion of types and forms of government, where it properly belongs.

**Criticism of the Above Classifications.**—As to the other bases of classification referred to above it may be said that most of them are arbitrary, since they relate to accessory characteristics and concomitant phenomena of states rather than to their essential constituent elements, and most of them are unscientific and do not serve to distinguish states on the basis of their fundamental characteristics. Classifications based on extent of territory, population, wealth, resources, the nature of their industries, degree of civilization, credit rating, vital statistics, etc. may serve the purpose of the historian, the economist, and the sociologist, but for the jurist or political scientist they are wholly unsatisfactory and of little value. Classifications of states as agricultural, commercial, industrial, military, territorial, and the like have no more interest for the political scientist than a classification of animals or plants on the basis of their size, height, or color has for the natural scientist.

As Jellinek justly remarked, such labeling furnishes no indication

<sup>2</sup> "The Foundations of the Modern Commonwealth" (1923), pp. 68, 77.

of the structure of the state or as to what makes a state.<sup>3</sup> Many classifications cross and overlap one another in the most diverse manner so that each state falls in a number of classes, all of which together fail to afford any clue to the real nature of the state. The uselessness of such classifications becomes especially evident when virtually all states may be assigned to a particular class. Thus nearly all states could be classified as agricultural, industrial, or commercial; now that city states have virtually disappeared, nearly all states are territorial or country states, as Professor Seeley would say; most of them claim to be "civilized"; all of them consider that they are "culture" states, in the sense that one of their ends is the promotion of civilization. All states fall within the category of socalled "law states" (*Rechtsstaaten*), of which German writers have made so much, in the sense that they are governed in accordance with legal rules or in the sense that one of their ends is the creation, definition, and protection of legal rights. To-day practically all states are "constitutional" states in the sense that the organization and powers of their governments are determined in varying degree by constitutions of one kind or another.

**Difficulty of Finding Proper Criteria for Classifying States.—** In arriving at a satisfactory classification of states the essential problem is to find a scientific principle, some juridical criterion, on the basis of which states can be distinguished in their form, spirit, or fundamental characteristics. Jellinek remarked that there are certain constant relations or events which are found in all states, whatever may be their dissimilarities of detail. These elements are juridical or political in their character and they alone afford a scientific basis of classification.<sup>4</sup> As remarked above, states are all fundamentally alike in their essence and substantially so in their objects and ends, and while they differ in respect to the organization of the agencies through which their wills are formulated and executed and in respect to various external phenomena, these latter do not furnish satisfactory criteria according to which states themselves may be intrinsically distinguished from one another and grouped into separate and clearly differentiated classes.

<sup>3</sup> "Recht des modernen Staates" (French ed.), vol. II, p. 392.

<sup>4</sup> *Op. cit.*, vol. II, pp. 394-395.

**Aristotle's Criteria.**—The principle which has commended itself to many writers from ancient times to the present is the number of persons in whom the sovereign power of the state is vested. On this principle states have been classified as monarchies, aristocracies, and democracies. A monarchy is defined as a state in which this power is vested in a single person; an aristocracy is one in which it is vested in a few persons (the *best* persons as the Greeks conceived it); a democracy is one in which it is vested in the general mass of the population. In substance, this classification has been attributed to Aristotle, who is sometimes called the "father" of political science. He did not, however, distinguish the state from the government and apparently his classification was really nothing more than a classification of governments on the basis of the number of persons who exercised, or had the final right to exercise, the power of government. As appears from the most authoritative English translation of his "Politics" (that of Jowett), Aristotle, after mentioning the various "forms of government," said: "The true forms of government, therefore, are those in which the one, the few, or the many govern with a view to the common interest." These were monarchy, aristocracy, and what he called "polity," the nearest modern English equivalent of which is perhaps "constitutional democracy." They were the normal forms of government, the forms which aimed at the achievement of the common good. Each of these forms had a corresponding perverted or corrupt form. Thus when monarchical government was conducted with a view to the selfish private interest of the monarch it became a tyranny; when aristocratic government was conducted with a view to the selfish interest of the few it became oligarchy, and when polity was conducted with a view to the selfish interest of the many it acquired the degenerate form of democracy.<sup>5</sup>

It will be seen that Aristotle's classification was based on two principles: first, on the number of persons to whom the supreme right and power of government belonged; and, second, upon the aim, spirit, or end of the government. Aristotle's classification, in so far as it was based upon the number of persons through whom the will of

<sup>5</sup> See his "Politics," bk. III, 7, bk. IV. 1. (Jowett's trans. 1908, pp. 114-115, 147). But Aristotle was not the first writer to attempt a classification of governments or states. Herodotus before him appears to have recognized several different types.

the state is expressed and enforced, has found many adherents, and writers are not lacking to-day who maintain that it cannot be improved upon.

**Criticism of Aristotle's Classification.**—But it has also been criticized on various grounds. In the first place, as stated above, it is in the final analysis, not a classification of *states* but of *governments* and therefore has no rightful place in a discussion of forms of state. In the second place, it is unsound as a classification of governments because it does not rest upon any scientific principle by which governments may be distinguished from one another in respect to their fundamental characteristics and forms of organization. In short, the principle upon which it rests is arithmetical rather than organic, quantitative rather than qualitative in character.<sup>6</sup> Thus the distinction between aristocratic and democratic forms of government is merely numerical—a distinction of degree—and not an organic or juridical difference. The attempt to distinguish between them must, therefore, lead to hairsplitting, since any line of demarcation which may be drawn between them may be largely arbitrary. Seeley criticized Aristotle's classification on the ground that it was hardly applicable to states of to-day. He knew only city states and they were "marvelously unlike" the "country states" of modern times and therefore any classification which would put them in the same category would be of little value.<sup>7</sup>

<sup>6</sup> Such was the criticism of Von Molt in his "Encyklopädie der Staatswissenschaften," p. 111. Burgess ("Political Science and Constitutional Law," p. 72) considers Aristotle's principle of classification in so far as it is a basis for the classification of *states* (but not of *governments*) to be sound and logical. He would, however, define monarchy, aristocracy, and democracy as states not as the *rule* of one, the few, and the many as Aristotle did, but as the *sovereignty* of one, the few, and the many. The criticism that Aristotle's principle of classification was merely numerical rather than organic or spiritual, Burgess does not think a just one, for the reason that numbers and proportions may serve to indicate the extent to which the consciousness of the state has spread among the population and the degree of intensity with which it has developed. The number of persons inspired with this consciousness and therefore participating in the organization and government of the state determine its organic character.

My colleague, Professor Fairlie, also maintains that the distinction between aristocracy and monarchy and between aristocracy and democracy is not merely quantitative but is qualitative as well, since aristocracy, at least in the sense in which the Greeks understood it, connoted government by the *best*. That it was also government by the few was merely an accidental circumstance.

<sup>7</sup> "Introduction to Political Science," p. 46.

Assuming that Aristotle meant by monarchy and aristocracy states in which *sovereignty* and not merely the *power of government* was vested in one or the few, his classification would be of little practical value to-day for the reason that there are few if any civilized states in which sovereignty is vested in one man or a small class. And to describe such states as Great Britain as monarchies, since it gives no indication of the real character of the state or its form of government, is worthless. It would, moreover, result in placing Great Britain in the same class with states like the former empires of Russia and Turkey and other states which had very few elements of similarity with the British state and it would equally result in the assignment of Great Britain and the United States, both of which are in fact democratic republics, to different classes.

**Theocracy as a Form of State.**—Many writers, especially earlier ones, made a place in their classifications for the so-called theocracy, that is, a form of state in which the ultimate sovereignty was assumed to rest in the hands of God or some other super-human or spiritual being. German writers usually distinguished between two types of theocracy, the *pure* form and the *dualistic* or *limited* form. The pure theocracy was one in which the supernatural person to whom the sovereignty was attributed was alleged to rule directly and immediately without the aid of human intermediaries; that is, the monarch was considered to be God himself. The limited or dualistic theocracy was described as one in which the immediate ruler was not God, but a human king who ruled as his vicegerent and acted as the interpreter of the divine will, which was made known to him by revelation. As such he was "divinized" and sacred. The idea survived until very recently in the conception of royalty by the grace of God and in the coronation ceremony which was regarded as a special sacrament of the church.

Bluntschli gave as examples of pure theocracies Ethiopia, ancient Egypt, Persia, and the kingdom of the Jews.<sup>8</sup> To this list Von Mohl added ancient Mexico and Peru.<sup>9</sup> The Mohammedan states of the

<sup>8</sup> "Allgemeine Staatslehre," vol. I, bk. VI, ch. 6. For further accounts of the theocratic state see Von Mohl, "Encyklopädie," pp. 104-105, 113 ff.; Jellinek, "Recht des mod. Staates," pp. 180 ff.; Willoughby, "Nature of the State," pp. 253; Woolsey, "Political Science," vol. I, pp. 196-198, 467-500; Treitschke, "Politics," vol. II, ch. 14. <sup>9</sup> "Encyklopädie," p. 319.

Middle Ages were also largely theocratic in character. Mohammed considered himself the vicegerent of God, and the Koran contained the law and jurisprudence by which his people were governed. The caliph was both emperor and pope, and religious and temporal affairs were not clearly differentiated from one another. Treitschke remarked that all powerful Oriental states, with the exception of Phœnicia, were theocracies, and he mentioned Tibet as a later example. He also considered the papal states and the Ottoman Empire as theocracies. Other states of Europe until comparatively recent times possessed theocratic elements; and, as is well known, some of the early communities of North America were founded on a religious basis.

It would be easy to show that many modern states had their roots in the church. Throughout the Middle Ages the basis of the state was theocratic. Indeed, says Figgis, the church was not only a state but it was *the state*; the state in so far as it had an existence was the "police department of the church." The church took over from the Roman Emperors the theory of absolute and universal jurisdiction and developed it into the doctrine of *plenitudo potestatis* which was attributed to the head of the church. The church was a powerful rival of the state; in fact the world as we live it and think it, says Figgis, was forged in the clash of warring sects and opinions, in the secular feuds between clergy and laity, between Catholics and Protestants, Lutherans and Calvinists.<sup>10</sup> It was only at the end of the Middle Ages that the purely secular state emerged triumphant from the struggle. For a long time the alliance between church and state was the main support of the state; indeed down to the reign of Anne, says Seeley, the English church was the English state in a certain sense. For many centuries the church continued to exercise a wide degree of civil jurisdiction, it monopolized and exercised many functions which to-day belong exclusively to the state, and churchmen enjoyed equal authority with the officials of the state in the performance of various secular functions.<sup>11</sup> But as time passed the state everywhere tended to become more and more secularized, came to lean

<sup>10</sup> "From Gerson to Grotius" (1907), pp. 4, 5.

<sup>11</sup> In England down to 1857 the ecclesiastical courts had jurisdiction of such matters as marriage and divorce, wills, the care of minors and orphans, etc.

less upon the support of the church, and finally was able to support itself without religious props.<sup>12</sup>

"Theocracies and despotisms," observes an eminent writer, "have their place in the historical development of the state; and their work is as indispensable in the production of political civilization as is that of any other form of organization. We have not done with them yet, either. The need of them repeats itself wherever and whenever a population is to be dragged out of barbarism up to the lowest plane of civilization."<sup>13</sup> Juridically, however, the theocracy is not a distinct form of state, but is a form of either monarchy or aristocracy.<sup>14</sup> The sovereignty may be imputed to God or some other extramundane power, but the fact remains that whoever, whether priest or prophet, in the final analysis, interprets the will of this supernatural authority and enforces its commands, is, so far as political science and constitutional law are concerned, the actual legal sovereign. Ultimately God may be regarded as the ruler and source of authority, but his power must be humanly interpreted, made known, and actually exercised through human agencies. The will supposed to emanate from him must in the last analysis be the will of some human being or group. In reality theocracy is not a species of state but a form of government, and strictly speaking has no place therefore in a discussion of kinds of state.

## II. MODERN CLASSIFICATIONS

**The Classification of Waitz and Others.**—As has been said, attempts to classify states have been innumerable but it would serve little purpose to describe them all. It must suffice, therefore, to call attention to the classifications proposed by a few of the more eminent writers on political science. The German scholar, Waitz, classified

<sup>12</sup> Cf. Seeley, "Introduction to Political Science," lect. II.

<sup>13</sup> Burgess, "Political Science and Constitutional Law," vol. I, pp. 69-61.

<sup>14</sup> Bluntschli, however, maintained that theocracy is neither a form of monarchy nor of aristocracy, nor of democracy, but that it belongs to another fundamental type which he designates as *Ideokratie*. In a theocracy, he said, the real rulers are men conceived of as spiritual beings rather than as human personalities. "Psychologische Studien über Staat und Kirche," p. 238. See also Von Mohl. "Encyclopädie der Staatswissenschaften," p. 104. Treitschke (*op. cit.*, II, 11) classifies theocracy along with monarchy and republic as a distinct form of state.

states as republics, theocracies, kingdoms, unitary states, composite or compound states (*Gesamtstaaten*), federal states, and confederations.<sup>15</sup> This classification, however, will not stand the test of political science. Theocracy, as has been said above, is not a species of state but a form of government. Even if the contrary be admitted it would be more logical to treat it as a particular form of monarchy than a state falling within a class by itself. Some of the other groups of his classification overlap. Thus a kingdom may be at the same time unitary, federal, or otherwise composite. Since the state is a unit, all states are in a sense unitary; in another sense it may be said that the term "unitary" is applicable only to forms of government and not to states. The same may be said of the term "federal." Strictly speaking there can be no such entity as a "federal" state, since the term "federal" implies the idea of division, which is in contradiction with the principle of the unity of the state. Governments, on the contrary, may be federal in their organization. As to "confederations" they are clearly not states but leagues or associations of states. Gareis's classification of states as unitary (*Einheitsstaaten*) and composite (*Staatenstaaten*), the latter including real unions, federal unions, and confederations, is open essentially to the same objection.<sup>16</sup>

Pradier-Fodré, an eminent French writer on international law, classified states into two general groups: first, single states, and second, united states (*états-unis*). Within the first category he placed personal unions, real unions, and "incorporated" unions; and in the second group confederated states and federal states.<sup>17</sup> It is very doubtful whether a personal union can be regarded as a state at all; certainly, a confederation cannot be, and, as has been said, a state can hardly be described as "federal."

**Von Mohl's Classification.**—One of the best known of the older German writers on political science, Robert von Mohl, in his "Encyclopedia of the Political Sciences," written about the middle of the nineteenth century, attempted a most elaborate classification of states, though without reference to any single consistent principle or criterion. His classification was as follows: first, patriarchal states;

<sup>15</sup> "Grundzüge der Politik," pp. 36-42.

<sup>16</sup> "Allgemeine Staateslehre," in Marquardsen, "Handbuch des öffentlichen Rechts," vol. I, sec. 38.   <sup>17</sup> "Traité de droit international public," vol. I, p. 215,

second, theocracies, or those which have a religious purpose and which are under the guidance and direction of a supernatural power ; third, patrimonial states ; fourth, classic or antique states, such as those of early Greece and Rome ; fifth, legal states (*Rechtsstaaten*), or those whose sphere of action is determined by law and whose activities are regulated by legal norms ; and sixth, despotic states, or those which are ruled without regard to the prescriptions of law. Von Mohl recognized also a form which he called the military vassal state, and he subdivided classic states into monarchies, aristocracies, and democracies.<sup>18</sup> An examination of Von Mohl's classification will show, as has been said, that it is based upon no single logical or scientific principle. Some of the forms which he enumerates overlap one another, while some of the terms he uses are wholly inapplicable to the states of the present day. The patriarchal state is at the same time a monarchy and so is the theocracy, the despotism, and the patrimonial state. Moreover, all states are despotic in the purely legal sense, and all states, as has been said above, are legal states in the sense that they are the source of law and govern according to the prescriptions of law. To classify states as "classic" or antique is about as logical and scientific as to classify them as "territorial" states, "human" states, "medieval" states, "modern" states, etc. Such terms do not belong properly to the nomenclature of political science, but to that of literature and history, and hence such classifications have little or no scientific or practical value. Von Mohl would have been more consistent had he classified states as ancient, classic, medieval, and modern, although it would have been chronological and not scientific.<sup>19</sup>

**Bluntschli's Classification.**—The noted Germany-Swiss pulicist, Bluntschli, who in his "Theory of the State" discussed at great length the different forms of state, adopted Aristotle's classification although he added a fourth type, theocracy, which in its perverted form he styled "ideocracy." In addition to these "fundamental" forms he recognized a group of "secondary" forms which he considered necessary to complete the Aristotelian classification, namely, free, half-free, and unfree states. Theocracies, he said, tend to become unfree states ; aristocracies "gravitate" toward the half-free class ; while democracies

<sup>18</sup> "Encyklopädie der Staatswissenschaften," secs. 15, 43-44, 47, 48, 50.

<sup>19</sup> Compare Burgess, *op. cit.*, vol. I, p. 74.

naturally belong to the free type, although they may become despotsms.<sup>20</sup> Furthermore, he added confusion by attempting to classify states as civilized monarchies, patriarchal kingships, feudal monarchies, military and judicial principalities, absolute, limited, and constitutional monarchies, compound states, and various others.

Bluntschli's classification is open to most of the objections that have been made to those of the writers who preceded him. It is unscientific, it is based on a confusion of state and government, and some of the entities to which he attributed the character of states are not states. Thus, one of his categories included what he called the *Zusammengesetztestaatsform*--a compound state in which the sovereignty is divided between a union and the component states which form it. Examples are states which have colonial dependencies or vassal tributaries, personal unions, confederations, and federal unions. But a colony is not a state nor is a state possessing colonial dependencies a compound state. Neither is a personal union, nor a confederation. Personal unions and confederations, as stated above, are not even states, but associations of states. On the other hand, a federal union is a state but not a compound state. The employment of the term "federal" to describe the nature of the union and its form of government is entirely legitimate but as already stated above it is not a suitable term to apply to the state, since the state itself cannot be "federal." To speak of a "federal" state is manifestly a *contradictio in adjecto*.

**Jellinek's Classification.**—One of the greatest of modern political scientists, the late Professor Georg Jellinek of the University of Heidelberg, after a searching examination of the multifarious classifications of forms of state that had been proposed by a long line of writers beginning with Aristotle, rejected all of them as being arbitrary, unscientific, confusing, or valueless. Most of them, he said, were open to the objection that they were not based upon any consistent juridical principle or criterion which could serve as a basis for distinguishing one state from others. His own conclusion was that only one such principle could be found and that was the particular manner by which the will of the state was formed and expressed. This it will be recalled was the criterion which Aristotle adopted for the classification

<sup>20</sup> "Theory of the State," bk. VI, especially chs. 4-6; see also his essay entitled "Die Staatsformen," in his "Psychologische Studien über Staat und Kirche."

of forms of government. Jellinek did not, however, accept the Stagirite's trinity of monarchy, aristocracy, and democracy. Aristocracy and democracy he did not think were properly separate forms of state but rather particular forms of a single type, republic. He therefore proposed the simplest of all classifications that have been suggested, namely, monarchy and republic. Monarchy he defined as a form of state which is "guided by one physical will"—a will which, juridically, must be supreme over, and independent of, every other. In brief, a monarchy is a state in which the sovereignty rests in a single person. It is not necessary, according to Jellinek, that the power of the monarch should be original, underived, and belong to him in his own right, as many political writers hold.<sup>21</sup> That notion rests upon a conception of private law—a conception which regards sovereignty as a property right and not a right to rule. In short, it confuses the idea of *dominium* with the idea of *imperium*. It is admissible, therefore, only if one adopts the theocratic or patrimonial conception of the state. Jellinek admitted that there might be various types of monarchy, either ideally or actually, where the monarch is regarded as God or his earthly representative (the theocratic conception); as the owner of the state (the patrimonial conception); or as an organ, member, or representative of the state. Again, monarchies may be hereditary or elective; they may be absolute or limited; but whatever the differences in these or other respects, the one characteristic which is common to all of them, is the sovereignty of a single person.

A republic, on the other hand, is distinguished from a monarchy by the fact that the sovereign will rests not with a single person but with a group or college of persons more or less numerous. This body or collectivity has a *simple juridical* existence clearly distinguishable from the individual persons who form it. Its will therefore is distinct from the wills of the component individuals. Juridically, the difference between the several types of republic is merely *quantitative*, nor *qualitative*. From the political or social point of view there may be a vast difference between a state which is guided by the will of a small group of persons and one which is directed by a numerous group, since it is the difference between aristocracy and democracy; but juridically speaking no difference exists. All states, therefore, in which

<sup>21</sup> For example, Bernatzik, in his "Republik und Monarchie."

the will of the state rests with more than one person, whether they be aristocracies, oligarchies, timocracies, pleonocracies, democracies, or what not, may be grouped in the same class and labeled "republics"—a class which is juridically different and distinguishable from that to which monarchies belong. Republics like monarchies may be of various types: democratic, aristocratic, oligarchic; democratic republics may be direct or representative; they may be of the ancient or modern type; and so on. But whatever the differences they all possess one common feature, namely, their wills are formulated and expressed by a group of persons rather than by a single person.<sup>22</sup>

**Burgess's Classification.**—One of the most recent attempts at a strictly scientific classification of states was that made by Burgess in his notable work "Political Science and Constitutional Law," published in 1896.<sup>23</sup> He concluded that the Aristotelian classification of governments into monarchies, aristocracies, and democracies, if applied to states, was correct and exhaustive and that no additional forms could be made out of a combination of these three or by a union of several states. Monarchy he defined as a form of state in which the sovereignty rests with one person; aristocracy, as the sovereignty of a minority; and democracy, as the sovereignty of the majority. The additional forms suggested by various writers were either forms of government (not of state) or they were associations of states and not states themselves.

**Evaluation of Jellinek's and Burgess's Classifications.**—The proposed classifications of both Jellinek and Burgess possess the great merit of simplicity; they are meticulously logical and they represent an effort to differentiate forms of state upon the basis of a single, consistent juridical principle or criterion. But even the classifications which they propose are not entirely satisfactory nor are they wholly free from the objections which they themselves urged against various previous classifications. Their criterion of differentiation and classification is largely quantitative, arithmetical, or numerical and not one of principle. The line of demarcation between a state in which the sovereignty rests with a bare majority and one in which it rests with the minority especially if it be a large one, may be shadowy, in which case the dis-

<sup>22</sup> His classification of state forms may be found in his "Recht des modernen Staates," ch. 20.

<sup>23</sup> Vol. I, ch. 3.

tinction between a democracy and an aristocracy becomes very slight, so that they can hardly be assigned to separate categories. Jellinek was more logical than Burgess when he placed democracies and aristocracies in the same class and treated them as different varieties of a common form, republic.

**Conclusion.**—The truth is, there seems to be no single principle, or criterion, juridical or otherwise, upon which a satisfactory classification of states can be made. The principle adopted by Jellinek and Burgess is perhaps as logical and scientific as any that can be found, but the classifications which they made upon the basis of it are far from satisfactory. It is believed that by reason of the peculiar nature of states any attempt to differentiate between them and to classify them scientifically is largely futile and leads to results which have little or no practical or scientific value. Governments, on the other hand, readily lend themselves to the processes of differentiation and classification, and it is with these rather than states as such that the jurist and the political scientist may more advantageously occupy themselves, with efforts at classification. (See Chapter XIII.)

### III. PART-SOVEREIGN STATES

**Kinds of Part-Sovereign States.**—Many writers, especially on international law, recognize as states certain communities which are not entirely independent and therefore not fully sovereign in their external relations and which may not be completely so in respect to their internal affairs.<sup>24</sup> They are sometimes designated as half-sovereign states (French : *états mi-souverains*), sometimes merely as part-sovereign states. In some degree subject to the control of other states, they enjoy, nevertheless, a large measure of local autonomy and often possess an imperfect or limited international personality. Examples of such states are : (a) members of federal unions, (b) vassal states, that is, states under the suzerainty of other states, (c) states under the protection of other states, and (d) states under League of Nations

<sup>24</sup> Oppenheim ("International Law," vol. I, p. 161) designates vassal states and protected states as *half* sovereign and members of federal unions as *part* sovereign—a distinction which would seem to verge on hairsplitting. Fauchille ("Droit international public," vol. I, pt. I, 296) criticizes the classification of certain states as half-sovereign (*mi-souverain*) as made by Heffter, Martens, Pradier-Fodéré, and others, as being "amphibological, vague and inexact."

mandates. Some writers would also add permanently neutralized states to the list. Since the relationship between the part-sovereign state and the superior state upon which it is more or less dependent, varies according to the circumstances of each particular case, it is impossible to formulate a general rule which would accurately describe all states belonging to each class.

**Members of Federal Unions.**—As to the members of federal unions the view has already been maintained in the chapter on Sovereignty (Chapter VIII) that while popular usage attributes to them the character of states, it is scientifically inexact to speak of them as being partly sovereign and partly non-sovereign for the reason that sovereignty is a unit and therefore incapable of division without being destroyed. The view was there maintained that the members of federal unions are non-sovereign communities and that what is really divided between them and the state of which they are a part, is not sovereignty but jurisdiction or governmental power. It is true that the right of members of federal unions to a limited power of legislation and of diplomatic intercourse has occasionally been left to them (for example, the states of the German Empire, 1871-1918), but it was not a right of sovereignty since it was conferred by the constitution and could have been withdrawn by constitutional amendment.

**Vassal States.**—The second group of so-called part-sovereign states, vassal states under the suzerainty of other states, are, says Hall, portions of states which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community, such as that of making commercial conventions or of conferring their *exequaturs* upon foreign consuls.<sup>25</sup> The paramount state is called the suzerain, and its relation to the subject state is described by the term "suzerainty."<sup>26</sup> The relation between the suzerain state and the vassal state depends upon the circumstances of the particular case. In general it may be said that the vassal community has only such rights as have been expressly granted to it by the suzerain. It usually has a limited international capacity, but is subject wholly or partly to the suzerain in the management of its foreign affairs.

<sup>25</sup> International Law" (3d ed.), p. 31.

<sup>26</sup> The term "suzerainty" is of feudal origin. It was employed to describe the relation between a feudal lord and the vassals of which he was the "suzerain."

It is, however, generally independent of foreign control as regards its internal affairs. In the conduct of its foreign relations the suzerain may have the full power of initiation, or partial initiation, or only the negative power of veto over the acts of the vassal state. Former examples of vassal states were Bulgaria, Egypt, Rumania, Serbia, and Montenegro—all under the suzerainty of the Ottoman Empire, but all of which eventually acquired their independence of the Porte. The former South African Republic under the suzerainty of Great Britain from 1884 to 1901 was another example. There are no examples in existence to-day. As a type of political relationship it was always abnormal and provisional and was bound to disappear in the course of the political evolution of the world.<sup>27</sup> Of those which once existed some, like those under the suzerainty of the Ottoman Empire, were terminated by successful revolt; others, like the South African Republic, came to an end as a result of conquest and annexation by the suzerain state.

**Protectorates.**—“For the purposes of international law,” says a noted authority, “a protected state is one which, in consequence of its weakness, has placed itself under the protection of another power on defined conditions or has been so placed under an arrangement between powers the interests of which are involved in the disposition.”<sup>28</sup> The establishment of a protectorate usually takes place when a weak state places itself under the guardianship and protection of a more powerful state. Unlike a community under the suzerainty of another state, the rights of a protected state are rather residuary than delegated in their nature, and the presumption therefore is in favor of any international capacity claimed by it. As in the case of the vassal state, the exact relation between a protected state and the protecting state varies

<sup>27</sup> Compare Fauchille, *op. cit.*, vol. I, pt. I, p. 285.

<sup>28</sup> Hall, *op. cit.*, sec. 4. Despagnet, who is the author of the most important study of protectorates that has been written, defines a protectorate as “the contractual lien established between two states, in virtue of which the one, while not intending to surrender its existence as a sovereign power, cedes to the other certain of its rights of internal sovereignty or external independence, in return for defense against internal or external attacks of which it might be the object and for assistance in the development of its institutions and the safeguarding of its interests.” “Essai sur les protectorats” (1896), p. 51.

Fauchille (*op. cit.*, p. 259) defines a protected state as one “which is, or has been, placed under the *xgis* or tutelage of a stronger or more powerful state.”

with the circumstances of each particular case. In the great majority of cases the former surrenders to the latter control over its international relations and sometimes also certain of its powers of internal administration, especially those relating to military affairs, administration of justice, and the levying of certain taxes. In all other respects it remains an independent state with its own constitution, its own citizens, and its own system of law and government, unless the treaty establishing the protectorate otherwise provides. Treaties between the protecting state and other states are not binding upon the protected state, nor is it necessarily involved in a war between the protector and other states.

**Existing Protectorates.**—The only states forming protectorates in the strict legal sense to-day are the petty republic of Andorra in the Valley of the Pyrenees (191 square miles, population about 5000), which is under the joint protection of France and Spain;<sup>29</sup> and apparently the principality of Monaco (8 square miles, population about 22,000), whose independence, sovereignty, and territory are guaranteed by France (treaty of July 17, 1918) and which in return has engaged to exercise its rights of sovereignty in perfect accord with the political, military, naval, and economic interests of France, and to abstain from alienating its territory, wholly or in part, to any other power than France. In case of vacancy in the succession to the crown "the principality shall form under the protection of France an autonomous state under the name of the state of Monaco."<sup>30</sup> Some writers also consider the petty republic of San Marino, an enclave of Italy (38 square miles, population about 14,000) to be a protectorate of Italy, but there is a difference of opinion as to its exact status.<sup>31</sup> Some writers have considered Cuba (in 1903-1934) and Panama and even the Dominican Republic and Haiti as *quasi-protectorates* of the United States, resulting from recent treaties between the United States and those republics. As to

<sup>29</sup> The protection of Spain is exercised through the bishop of Urgel. The republic pays annually the sum of 960 francs to France and biannually 841 francs to the bishop of Urgel. Merignac considers it to be a vassal rather than a protected state.

<sup>30</sup> Monarchville, "Le nouveau statut franco-monégasque," *Rev. gén. de droit int. pub.*, 2d ser., vol. II, pp. 217 ff.

<sup>31</sup> It was stipulated by a treaty of June 25, 1897, between the Republic and Italy that while being placed under the protection of Italy it should conserve its own internal autonomy and external sovereignty. During the World War it remained neutral.

Panama (see the treaty of Nov. 18, 1903) there would seem to be no doubt that it is virtually under the protection of the United States; as to the others the relationship is, or was, under treaties not very different (see, for example, the so-called Platt Amendment, in effect 1903-1934 by treaty with Cuba).<sup>32</sup> By the treaty of Versailles the German free city of Danzig was placed "under the protection of the League of Nations," while the control of its foreign affairs and the protection of its nationals in foreign countries were vested in the government of Poland.

Among former examples of protectorates which have disappeared either through annexation to the protecting state, through cession to other states, or through the concession to them of independence may be mentioned the Ionian Islands, under the protection of Great Britain, 1815-1863; Madagascar, under the protection of France, 1863-1896; Abyssinia, under the protection of Italy, 1889-1896; Korea, under the protection of Japan, 1904-1910; and Egypt, under the protection of Great Britain, virtually from 1883, formally from 1914 to 1922.<sup>33</sup> There are still numerous colonies and territories in Africa and Asia which constitute protectorates of European powers, but they are not states. Among them may be mentioned Tunis, Morocco, Zanzibar, Tonkin, Annam, the Malay States, and various others.<sup>34</sup>

**States under Mandate.**—Certain territories formerly constituting a part of the Ottoman Empire, namely Palestine and Trans-Jordan, which were placed under the administration of Great Britain as a mandatory power, acting on behalf of the League of Nations, are now generally regarded as part-sovereign states. The same is true of Syria, under mandate to France<sup>35</sup> (and was also true of Iraq,

<sup>32</sup> As to the status of these four Latin-American Republics in their relation to the United States see Fauchille, *op. cit.*, vol. I, pt. I, pp. 271 ff.

<sup>33</sup> Great Britain still exercises over Egypt a tutelage somewhat analogous to the Monroe Doctrine.

<sup>34</sup> The latest and most satisfactory treatment of protected and vassal states will be found in Oppenheim, *op. cit.* (3d ed., 1920), vol. I, pp. 161 ff.; and Fauchille, *op. cit.* (1922), vol. I, pt. I, pp. 259 ff. Fauchille's treatment contains elaborate bibliographies of the literature.

<sup>35</sup> As to the non-sovereign character of these states see *supra*, p. 59. See also Q. Wright, "Sovereignty of the Mandates," *Amer. Jour. of Int. Law*, vol. XVII (1923), pp. 691 ff., and the same author's "Status of the Inhabitants of Mandated Territory," *ibid.*, vol. XVIII (1924), pp. 306 ff.; also his monumental work, "Mandates Under the League of Nations" (1930), especially part III.

formerly Mesopotamia, under mandate to Great Britain until 1927). The Covenant of the League of Nations refers to these territories as "having reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice or assistance by a mandatory until such time as they are able to stand alone." There is still, however, a difference of opinion as to the exact juridical status of these states. They are sometimes listed as independent states, which hardly seems in accord with the facts. On the other hand, they are certainly not under the complete sovereignty of the mandatory powers; their inhabitants are not regarded as nationals of the mandatory power; and they retain a large measure of local autonomy. The view expressed by one writer that the sovereignty of these states is in suspense during the operation of the mandates under which they are administered is not entirely satisfactory. The view of Professor Quincy Wright, ascribing the sovereignty of the mandated territories to the mandatory power acting with the consent of the Council of the League, is perhaps as satisfactory an interpretation as can be reached.<sup>36</sup> It follows, therefore, that neither the mandatory power nor the territory under mandate is fully sovereign.

**Neutralized States.**—A state whose independence and territorial inviolability have been guaranteed by the joint action of other states and placed in a condition in which it is forbidden to engage in offensive war is said to be neutralized.<sup>37</sup> Its immunity from attack on the part of other states is usually guaranteed by way of compensation for the restriction placed upon its freedom of action with regard to making offensive war. The status of neutralization may be conferred upon a weak state at its own request as a means of protection against

<sup>36</sup> Articles cited, pp. 698 and 315 respectively. Stoyanovsky in his book, "La théorie générale des mandats internationaux" (1925), rejects the view that the sovereignty in the case of the mandated states rests with the League of Nations and maintains that it resides in each case with the people of the territory, although its exercise has been provisionally confided to another power (the mandatory), "as trustee for the real sovereign, under the terms of the mandate conferred by the League of Nations."

<sup>37</sup> Fauchille (*op. cit.*, p. 695) points out that the neutralization may either be *guaranteed* or merely *recognized*; in the former case the parties to the treaty are under an obligation to defend its neutrality; in the latter they are only under an obligation not to violate it.

ambitious and unscrupulous neighbors ; or it may be conferred without regard to its own wishes by other states out of considerations affecting the general peace or the balance of power. Small states so geographically situated that they are in danger of being overrun by contending armies and of having their neutrality otherwise disregarded by opposing belligerents, are those which have usually been neutralized by the collective action of other states. The method by which neutralization takes place is always by treaty between the powers concerned. The state so neutralized must abstain from engaging in hostilities against other states except for the purpose of defense and must avoid international engagements which might involve it in war with another state. In all other respects it is fully sovereign and independent, and can enter into treaties of all kinds, except possibly those of alliance and guarantee, and can usually maintain armies and navies and erect fortifications for purposes of defense.<sup>38</sup> Some writers maintain that it cannot alienate any portion of its territory or extend its domain by the acquisition of new territories, but this view is denied by the majority of writers and it would seem justly so.

**Examples of Neutralized States.**—The most important examples during the nineteenth century of neutralized states were Switzerland, whose perpetual neutrality was recognized and guaranteed by the powers signatory to, and adherents of, the Act of the Vienna Congress of 1815 ; Belgium, whose independence and perpetual neutrality were guaranteed by the five signatory powers to the Treaty of London in 1831 (renewed in 1839) ; and Luxemburg, whose neutrality (unlike the others, an *unarmed* neutrality) was recognized and *collectively* guaranteed by the powers signatory to the Treaty of London of May 11, 1867.

The neutralization of Switzerland has never been seriously violated by any party to the treaty or by any other country, and Switzerland, on her part, has strictly and scrupulously fulfilled her obligations under the treaty.<sup>39</sup> But, as is well known, although Prussia was a signatory

<sup>38</sup> The neutralization of Luxemburg was an exception. It was prohibited by the treaty of neutralization from maintaining fortresses or armed forces further than was necessary for the preservation of internal order and peace.

<sup>39</sup> Upon the outbreak of the European war in 1914 the Swiss Federal Council proclaimed its firm determination not "to depart from the principles of neutrality so dear to the Swiss people and which corresponds so well to their aspirations."

of both treaties of neutralization, Germany invaded, for the purpose of attacking France, both Belgium and Luxemburg in 1914 in violation of the treaties. The German government requested the right of passage for its troops across Belgium, apparently on the assumption that the granting of the request by Belgium would not be incompatible with her obligations under the treaty of neutralization. The Belgian government, very correctly, took the position that it could not grant the request, even if it were disposed to do so, without itself violating the treaty. Practically all jurists are in agreement that the granting of the right of passage to Germany would have been inconsistent with Belgium's neutralized status.<sup>40</sup>

**Right of Neutralized States to Enter into Defensive Alliances and Acquire Colonies.**—Some German jurists later maintained in defense of Germany's conduct that Belgium's own policy had been inconsistent with her status of neutralization, in that she had before the war virtually entered into a military alliance with Great Britain and that by acquisition of the Congo territory in Africa her position as a European power had been so altered as to render the neutralization treaty no longer binding. Even admitting that it was an alliance for the defense of the guaranteed neutrality against its possible violation by one of the guarantors, it would hardly seem to have been incompatible with Belgium's neutralized status. Most writers, in fact, maintain that a neutralized state has an undoubted right to enter into alliances for the defense of its neutrality, and some hold that it is bound to take all steps necessary to protect that neutrality.<sup>41</sup> It is of course otherwise in the case of offensive alliances. Regarding the German contention that the acquisition by a neutralized state of colonies

So deeply attached was it to these "principles" that it requested admission to the League of Nations with the reservation that in case the League should find itself engaged in military operations against a covenant-breaking member, Switzerland should be exempted from the obligation to permit the passage of troops across its territory or of rendering military assistance—a reservation with which she was in fact admitted to the League. In 1921 the Swiss government refused a request of the Council of the League to be permitted to send to Poland a detachment of troops to protect and insure order during a plebiscite in the region of Vilna, on the occasion of the dispute between Poland and Lithuania. Fanchille, *op. cit.*, p. 708.

<sup>40</sup> The opinions are reviewed in my "International Law and the World War," vol. II, pp. 221 ff.

<sup>41</sup> As to this, see my work cited, pp. 209 ff., and the authorities there referred to.

is inconsistent with the status of neutralization, that too does not seem well-founded. Had Belgium enlarged her European territory so that her position as a small "busser" state would have been altered, the German objection would have been entitled to more weight. The acquisition of African territory did not change in any fundamental respect Belgium's position as a European power.

In consequence of the failure of the neutralization treaty to afford the security which it guaranteed, Belgium at the close of the World War made known her desire to be liberated from the status of neutralization, and consequently the neutralization treaty of 1839 was declared by the treaty of Versailles (Art. 31) to be abrogated. By the same treaty the neutralization of Luxemburg was terminated. Switzerland, therefore, remains the only European state which is neutralized.

## CHAPTER XII

### ASSOCIATIONS AND UNIONS OF STATES

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#### I. PRINCIPLES OF CLASSIFICATION

**Kinds of Unions.**—Two or more states may join themselves together into associations, leagues, or unions for the achievement of either general or particular objects, and the forms which such associations take lend themselves to differentiation and classification much more readily than do states themselves. In some cases the unions thus formed are themselves states, in which case their component members lose by the act of merger their character as real states; in other cases no new state is created by the union, in which case the members

retain their identity as states ; in other cases still there is doubt as to whether a new state is created by the union, although it is clear that the states forming it do not lose their character as states. Unions of states may rest upon the principle of equality, each associate member retaining its own sovereignty and independence ; upon the principle of inequality, where some of the members stand in the relation of superiority in respect to the others ; or upon the principle of equality among themselves in respect to their competence, the members not retaining their sovereignty and hence the right to determine the limits of their own competence.

**Jellinek's Classification of Unions.**—The late Professor Jellinek whose studies of state unions represent the most valuable contribution that has been made to the literature of the subject,<sup>1</sup> classified the various associations of states (*Staatenvereinige*, *Staatenverbindungen*) which have a juridical foundation into two general groups : first, those which are *organized* ; and, second, those which are *unorganized*. In the first category, he placed those in which more or less permanent juridical relations have been entered into among the associated states for the advancement of certain common political ends but in which no central administrative or other common organization has been created. Within this class he included such associations as alliances, ententes, leagues, etc., formed for the purposes of common defense against attack, the guarantee of particular rights, the maintenance of neutrality, etc. They are necessarily created by treaties and conventions between the states forming them. Within this class he also placed the form of union to which he gave the name of *Staatenstaat*, an association in which there is a liaison between a superior and an inferior state, the latter being subject more or less to control by the former, particularly in regard to its foreign relations.<sup>2</sup> Examples of this type of association were afforded by the feudal system of the Middle Ages, the old German Empire after the peace of Westphalia, the system of vassal states in their relations with the Ottoman Porte, and the modern system of protectorates. The

<sup>1</sup> Notably his "Die Lehre von den Staatenverbindungen" (1882) and his "Recht des modernen Staates" (1905), ch. 21. Other writers who have discussed the subject more or less fully may be mentioned :—Waitz in his "Grundzüge der Politik" (1862) ; Brie, "Theorie der Staatenverbindungen" (1886) : Westerkamp, "Staatenbund und Bundesstaat" (1892) ; and Willoughby, "The Fundamental Concepts of Public Law" (1925), ch. 13.

<sup>2</sup> "Lehre von den Staatenverbindungen," pp. 137 ff.

establishment of these relationships was the result of various causes, mainly historical, although in the case of protectorates they were created either by the unilateral act of the protecting state, sometimes without the consent of the protected state, or by voluntary conventional arrangement.

This classification is not entirely satisfactory, since it attributes to alliances the character of unions of states, which they are not in any juridical sense. It may also be doubted whether the relationship between a vassal state and its suzerain and that between a protected state and its protector, especially when the status of dependence created in both cases has been imposed upon the inferior state against its will, may be properly regarded as a "union" of states. The notion of union implies an association voluntarily entered into by co-equal states rather than a dependent status imposed upon a weaker state by a superior state.

The second class of unions according to Jellinek's classification, namely "organized" unions, includes those which not only are bound together by relations of a juridical nature but also have certain common central organs such as a common chief of state, common administrative bureaus, commissions, or other organs, common assemblies which may or may not be full legislative bodies, etc. In this group he placed personal unions, real unions, confederations, federal unions, and international administrative unions. Each differs from the others in important particulars but they all have one common characteristic, namely, a central organ or organs through which the will of the union is manifested and by which certain common objects are sought to be promoted.<sup>3</sup>

## II. PERSONAL AND REAL UNIONS

**Personal Unions.**—A personal union exists where two or more states, invariably monarchies, have the same physical person as their king or chief of state. The relationship is usually accidental in character, resulting normally from the fact that in virtue of the laws of succession

<sup>3</sup> Some writers classify real unions, confederations, and federal unions as different forms of a "composite" state which they distinguish from a "simple" state. Compare Pradier-Fodéré, "Traité de droit int. pub.", vol. I, p. 207. But this classification is unsound for the reason that real unions and confederations are not in fact states nor is a federal union a "composite" state. Its government may be composite but the state cannot be.

in two or more states the right to the crown devolves in both countries upon the same person. A personal union therefore is not, in the strict juridical sense of the term, a real union of states, but as Jellinek remarks, it is rather a *communis incidens* resulting from the operation of both constitutional and international law.

But a personal union might also be established by treaty arrangement or by the election by one state of the reigning sovereign of another state to be its king, in which case the union would terminate by his death unless it were renewed by the election of his successor. Where the union results from the operation of succession laws it will be terminated where under the law of one of the states the crown devolves upon a person, for example a woman, who under the rules of succession of the other state would be ineligible to the throne in that country. It is characteristic of personal unions therefore that they are generally of temporary duration. Each of the associated states is entirely independent of the other ; each has its own constitution and laws, its own distinct political organization, and its own citizenship and local institutions. The acts of their common sovereign in relation to one of the member states have no application within the territories of the other nor any force over its citizens. Indeed, the subjects or citizens of the one may be and usually are foreigners to the other. Though only one person, the sovereign possesses two distinct legal personalities and may enjoy widely different powers and attributes in the different states composing the union. He may be an absolute ruler in one and a constitutional ruler in the other. In international as well as in internal relations each constitutes a distinct and separate personality, so much so that one might make war upon the other without affecting the union, or declare war against a third power without involving the belligerency of its associate. Such a union does not constitute a state or a person in international law distinct from the states which compose it. Each member of the union retains its own international personality ; each ordinarily conducts its own foreign relations and for this purpose maintains its own diplomatic service, but they may employ, and sometimes have in fact employed, common diplomatic representatives, in which case the latter are the representatives not of the union but of the member states individually.<sup>4</sup>

<sup>4</sup> Fauchille, "Droit int. pub." vol. I, pt. I, 1922, pp. 228, ff.; Oppenheim, "International Law" (3d. ed., 1920), vol. I, p. 154; Calvo, "Droit international," vol.

**Examples of Personal Unions.**—Examples of personal unions were the union between Spain and the old German Empire under Charles V, 1520-1556 ; between England and Scotland, 1603-1707, terminated by their merger in the United Kingdom of Great Britain ; between Great Britain and Hanover from 1714 to 1837, terminated by the accession of Victoria as Queen of Great Britain, the laws of succession in Hanover not permitting females to succeed ; between Holland and Luxemburg, 1815-1893, terminated for the same reason as that between Great Britain and Hanover ; between Schleswig-Holstein and Denmark, 1776-1863 ; and finally, the general act of the Berlin Conference of 1885, followed by a Belgian law of the same year, which declared that the relation between the king of the Belgians and the Congo state should be exclusively personal in character.<sup>5</sup> The union was terminated in 1908 by the annexation of the Congo to Belgium. The only existing personal union is that between Denmark and Iceland, which was formed in 1918 by the enactment of laws by the parliaments of both countries under which King Christian X of Denmark became King of Iceland. In virtue of the arrangement Denmark is charged with the conduct of the foreign affairs of Iceland, which latter state remains independent in other respects and is declared to be perpetually neutral. She employs her own merchant flag, but has no naval flag of her own. Provision is made for a joint advisory committee of the two parliaments to deal with legislation affecting both countries and for a court of arbitration to decide disputes which may arise between

I, secs. 45-48 ; Pradier-Fodéré, "Traité de droit international public," vol. I, pp. 201-202 ; Juraschek, "Personal-und Realunion." Some writers classify the personal union as a form of composite state, but there is no justification for such a classification, since such a union constitutes no new state but represents only a condition in which two or more states employ a common agent for certain purposes. Martens classifies it under the head of united states (*états-unis*), which is more defensible. *Op. cit.*, sec. 58.

<sup>5</sup> Rivier, *op. cit.*, vol. I, pp. 94-95. The king of Prussia until 1848 was sovereign of the principality of Neufchatel, then a member of the Swiss Confederation (see Pradier-Fodéré, *op. cit.*, vol. I, p. 202). Rivier asserts that the connection between Great Britain and India since 1877, when Victoria was proclaimed Empress of India, has been that of a personal union, but manifestly this was not an example of a personal union. Wheaton added Norway and Sweden (after 1814) to the list of personal unions ("Elements of International Law," ed. by Lawrence, p. 72) but, as pointed out below, it was rather an example of a real union. It has been asserted that the relations between Russia and Finland before 1917 were that of a personal union, but this view is controverted.

the two countries. It was agreed that the citizens of each country should be accorded full rights of citizenship in the other.<sup>6</sup>

**Real Unions.**—A "real union" results from the joining together of two or more states, not merely through the existence of a common ruler, but through the creation of common constitutional or international arrangements for the administration of certain common affairs. Such a union occurs, says Hall, when states are indissolubly combined under the same monarch, their identity being merged in that of a common state for external purposes, though each may retain distinct internal laws and institutions.<sup>7</sup> It differs from a personal union in that the associated states of component members are organically united by constitutional bonds and have common organs of government but each retaining its own independence and sovereignty.<sup>8</sup> It also possesses greater elements of permanence, its existing being unaffected by the death of the common sovereign or the extinction of the reigning dynasty.<sup>9</sup> Some writers, among them Westlake, maintain that a so-called real union constitutes in itself a state separate and distinct from the individual states which compose it, but others, such as Oppenheim,

<sup>6</sup> Regelsperger, "L'Islande, nouvel état indépendant," *Rev. des Sciences Politiques*, vol. XI.III (1921), p. 411. Although the present relationship between Denmark and Iceland is usually classified as a personal union, there is good ground for maintaining that it is in fact a real union,—as much so as that between Norway and Sweden prior to 1905, described later.

<sup>7</sup> "International Law," p. 28. Brie defines a "real union" as a "*Verein von Staaten mit rechtlicher Gemeinsamkeit der Person des Staates oberhaupts und zwar des monarchischen Staats überhaupts.*" "Theorie der Staatenverbindungen," p. 69. See also Martens, *op. cit.*, vol. I, p. 323; Moore, "Digest of International Law," vol. I, sec. 9; Rivier, *op. cit.*, vol. I, pp. 97 ff.; LeFur und Posener, "Bundesstaat und Staatenbund," sec. 73; Pradier-Fodré, *op. cit.*, vol. I, pp. 202-204; Fauchille, *op. cit.*, vol. I, pp. 283 ff.; Oppenheim, *op. cit.*, vol. I, pp. 154 ff.; and Blüthigen, "L'Union réelle," *Zeitsch. für Völker- und Bundesstaatsrecht*, 1937, pp. 237 ff.

<sup>8</sup> Juraschek, "Personal- und Realunion," p. 65.

<sup>9</sup> Jellinek considers the "real union" to be a special form of confederation (*Staatenbund*) which results from the legal union of two or more independent states for common protection under one and the same physical personality, who acts as the common bearer of the power of the component members, though each retains its sovereignty. "Die Lehre von den Staatenverbindungen," p. 215. A. B. Hart ("Federal Government," pp. 14-15) groups "personal" and "real" unions together with the so-called "incorporate" union under the head of "conjunctive" unions, since the distinguishing characteristic of all such formations is that they employ conjointly the same sovereign.

De Louter, Fauchille, and Jellinek, adopt the contrary view and hold that it is merely a union of states constituting a single international personality. This view would seem to be sound. It is undoubtedly true, however, that such a union does possess some of the characteristics of a true state, much more so than does a personal union.<sup>10</sup>

The most notable example of a real union was that between Austria and Hungary, 1867-1919. The union between the kingdoms of Norway and Sweden from 1815 to 1905 was also an example. The former rested upon a compact, the terms of which were embodied in a pair of identical statutes adopted by the parliaments of the two states in 1867. They had the same ruling sovereign (who, it may be observed, possessed different titles and dignities in the two states and was crowned separately in each), but also a common legislative body for limited purposes, a common army organized in the same basis and commanded in a common language, a common diplomatic service, a common court of accounts, a common tariff and trade union, and common ministries of war, finance, and foreign affairs. The expense of the joint administration was borne by the two states according to a proportion agreed upon by them. In international intercourse the union constituted a single personality, though for most purposes of internal administration each state retained its own independence.<sup>11</sup> In consequence of the World War and the treaties of peace which terminated it the union between Austria and Hungary came to an end in 1919-1920.

The terms of the agreement by which Norway and Sweden were joined were embodied in a treaty of August 6, 1815. According to the agreement Norway recognized the king of Sweden as its sovereign

<sup>10</sup> Oppenheim and Jellinek assert that the member states of a real union cannot make war upon one another. But this depends upon the articles of agreement by which the union is formed. It is more within the truth to say that they cannot make war separately against a foreign state or be separate objects of war waged by a foreign power.

<sup>11</sup> Kollesburg ("Der monarchische Bundesstaat Österreich-Ungarn," 1880) considered the Austro-Hungarian union to be a federal state; Bidermann ("Die rechtliche Natur der österreichisch-ungarischen Monarchie," 1877) characterized it as a personal union. Hungarian publicists generally considered the relation little more than personal. Compare an article by Count Albert Apponyi in the *North American Review*, for May, 1905; also the authorities cited by Fauchille, *op. cit.*, p. 236, note 2. But Austrian jurists and those of other countries regarded it as a real union.

and representative in international relations, though the constitution of Norway expressly declared that Norway should remain a "free, independent, and indivisible empire." The treaty of union regulated the procedure to be followed in both kingdoms for the election of the successor of their common sovereign. The two states maintained a common diplomatic and consular service, though, unlike the Austro-Hungarian arrangement, their foreign relations were not conducted through the agency of a common Norwegian-Swedish ministry, but through the Swedish foreign minister, who managed the external affairs of both states.<sup>12</sup> The two states had different commercial and naval flags and distinct systems of internal administration ; and each had its own army under the command and direction of the joint king. Unlike the Austro-Hungarian union, there was nothing in the nature of a common legislative assembly, nor were there any joint ministries of state. Matters of common interest, which could not be regulated by the joint king, were dealt with by the concurrent action of the parliaments of the two kingdoms. The joint arrangements were indeed so few and unimportant that some writers have treated the relation as simply that of a personal union, though this is incorrect, since the perpetuity of the union did not depend upon any dynasty or law of succession. The increasing dissatisfaction of Norway and its desire for a real joint ministry of foreign affairs and a separate consular system led to the disruption of the union in 1905 by the secession of Norway and the conclusion between the two states of a treaty of permanent separation. There is therefore no example of a real union in existence to-day unless that between Denmark and Iceland is so regarded. Real unions represent a transitory form of relationship; usually they either become a federal or unitary state or what is more likely, they disappear through dissolution.

<sup>12</sup> While the two states had a common foreign policy, each retained its separateness and individuality in the family of nations and each sometimes concluded separate though identical treaties with foreign states. Thus the United States had identical extradition conventions, bearing different dates, with each state, though they were entered into with the king of Sweden and Norway. The obligation to deliver up fugitives from justice in each case rested, not on the common government, but upon the particular government concerned. "Treaties of the United States now in Force," 1899, pp. 486-471 and 621-625; Moore, "Digest," sec. 9. On the legal nature of the union between Norway and Sweden see Jellinek, "Staatenverbindungen," pp. 223-234.

## III. CONFEDERATIONS

**Character of a Confederation.**—Definitions of confederations, like those of states, are multisarious and no useful purpose would be served by quoting them. Most authors agree that a confederation is a union or association of states formed for the purpose of promoting or achieving certain specific objects, especially the maintenance of their common external security. The individual states, unlike those which unite to form a federal union or a unitary state, retain intact their own sovereignty and also their own governmental autonomy in so far as the latter is not expressly surrendered and delegated to the confederate organs established by the act of union. A confederation differs from a mere alliance in the possession of some sort of fixed central organ or organs through which the wills of the member states may be expressed, in the greater variety of the objects which it is designed to achieve, and in the element of intentional perpetuity.<sup>13</sup> It differs from a personal union in that the bond which unites the members is something more than the possession of a common titular sovereign. It results not from the accidental operation of laws of succession but from formal agreement or compact embodied in an international convention or "articles" of confederation. It is therefore a purely contractual creation resting upon international agreement rather than upon constitutional law and is more political than juridical.<sup>14</sup> Nor is it terminated in the same way that personal unions are, but usually comes to an end through secession and dissolution or through the establishment in its place of a federal union or a unitary state. It differs from a unitary state in that its component members are not mere administrative circumscriptions, but real states in full possession, as stated above, of their sovereignty and independence. Unlike a federal union, a confederation does not possess a single sovereignty, but there is a plurality of sovereignties, as many in fact as there are states composing it. Ordinarily each member state remains an international

<sup>13</sup> Wheaton, however, maintained that a confederation differs in no essential particular from an alliance. "Elements of International Law" (Lawrence's ed.) p. 75. But as Austin remarked, they cannot be precisely distinguished by general or abstract statements, since there are various types of both, some of which bear striking resemblances, the one to the other. "Province of Jurisprudence Determined" (ed. 1861), pp. 223-224.

<sup>14</sup> Compare Fauchille, *op. cit.*, vol. I, p. 242; Carré de Malberg, "Théorie générale de l'état," p. 92; Kunz, *op. cit.*, pp. 435 ff.

person ; it may therefore enter into treaty relations with foreign states and even engage in war with them without involving their associates. If war breaks out between two or more of them it is international war and not civil war. Nevertheless, the pact of union in a particular case may confer the rights of legation, of war, and of peace upon the organs of the Confederation. What, therefore, is said of the relations generally existing between a confederation and its members may not be true of every confederation. It all depends upon the terms of the pact in each particular case. Finally, a Confederation differs from a real union in its purposes and in its nature. It is formed mainly for defense and it is lacking in the common organs which are characteristic of a real union.

Confederations have no citizens or subjects to whom their commands can be directly addressed, or from whom obligations or duties may be required. Being composed of sovereign states, their governmental organizations rarely operate directly upon individuals, but reach them only through the medium of the separate state organizations.<sup>15</sup> The will of the confederation is but the sum total of the wills of the component states,<sup>16</sup> and is expressed, not in statutes framed by a real legislative body, but in ordinances or resolutions framed by a quasi-diplomatic body, a diet, a conference, or a congress consisting of plenipotentiaries or delegates representing the governments of the several states composing the confederation.<sup>17</sup> These delegates usually vote by states and according to the instructions of the governments which they represent.<sup>18</sup> Their resolutions have no binding effect upon individuals

<sup>15</sup> Jellinek recognized two types of confederation : first, that in which the acts of the confederate government do not have an immediate binding effect upon the individuals composing the several states ; and second, that in which the diet of the confederation is not merely a congress of plenipotentiaries, but a real legislative body, whose acts operate directly and immediately upon individuals rather than upon the states composing the confederation. The latter form approaches closely the so-called federal state. The only example which Jellinek gave of the second type was the Confederacy of the Southern States of North America, 1861-1865. "Staatenverbindungen," pp. 189-195. But an examination of the constitution of the Southern Confederacy will show that it was a confederation only in name, and differed in no essential particulars from other states having the federal system of government.

<sup>16</sup> Cf. Rivier, *op. cit.*, vol. I, p. 102 ; Pradier-Fodérè, *op. cit.*, vol. I, p. 207.

<sup>17</sup> Jellinek, "Staatenverbindungen," p. 176.

<sup>18</sup> Cf. Brie, "Theorie der Staatenverbindungen," p. 91.

as such, but are addressed, as already said, to the organs of the confederated states, and are usually inoperative until adopted by their governments and given the force of law within their jurisdictions. The congress or diet of a confederation has no power to enforce its resolutions except by "federal execution," that is, by the use of force against a recalcitrant member. Most of the confederations in the past have in fact had no executive or judicial machinery, and have therefore been compelled to rely upon the willingness of the member states to enforce their commands. It follows from the nature of a Confederation that its component members are free to withdraw at will and thus dissolve the confederation, and the confederate authorities have no constitutional power to restrain a disaffected member and compel it to remain in the confederation against its will.

**A Confederation is Not a State.**—Regarding the juridical nature of a confederation the authorities differ. One group, which includes Borel, Carré de Malberg, Fauchille, Jellinek, Laband, Von Mohl, and Oppenheim, deny that it is itself a state, or a "moral person," as the French say. It is on the contrary merely a *vinculum juris* between sovereign states, a simple association, having no juridical personality of its own and no rights or competence except such as exist in virtue of express delegation by the confederated states. Another group of writers, which includes LeFur, De Louter, and Schulze, while admitting that it is not a state, maintain that it possesses, nevertheless, an international personality as do also the component states.<sup>19</sup> The fact is that no known confederation ever possessed the character of a true state, but there is no reason why it cannot possess at least a limited international personality. Whether it does or not depends upon the terms of the particular pact upon which it rests.

**Examples of Confederations.**—History abounds in examples of confederations, for the tendency of neighboring states to associate themselves together for purposes of defense and for the furthering of their common interests has proved to be almost as strong as the social impulse among individuals. Among the ancient Greeks, confederations were numerous, the more important being the Boeotian, Delian,

<sup>19</sup> Fauchille, *op. cit.*, vol. I, p. 242. Willoughby agrees that a confederation is, strictly speaking, no state, but he expresses no opinion as to whether it possesses an international personality or not. "Fundamental Concepts of Public Law," p. 192.

Lycian, Achæan, and Aetolian leagues. In some cases the component members were federated together much more closely than in others. The constitution of the Achæan League, for instance, provided for a common executive magistracy, a legislative body, and even a rudimentary judiciary.<sup>20</sup> Its organization was, in fact, so highly developed that it is considered by some writers to have been essentially a federal union rather than a confederation.<sup>21</sup> Leagues and confederations among the early Italian cities were not uncommon, though they never attained the perfection and degree of importance of those of Greece. During the medieval period several important federations were formed, among which may be mentioned the Rhenish Confederation (1254-1350), which eventually embraced some seventy members. Then came the Hanseatic League (1367-1669), which was originally organized for the promotion and protection of trade, but which gradually developed into a great political power that waged war and negotiated treaties, and eventually came to exercise an important influence on the international affairs of Europe. It had a sort of central legislative organ and a crude judicial machinery for the adjudication of disputes among the members.<sup>22</sup> The Holy Roman Empire (1526-1806), the most extensive federation formed before the nineteenth century, eventually embraced several hundred states of varying types and importance—free cities, ecclesiastical territories, and hereditary monarchies. It maintained a common Diet (*Reichstag*) and several imperial courts.<sup>23</sup> Other examples were: the Swiss confederations of 1291-1798 and 1803-1848, which grew out of the union of three small cantons, but which in the course of time came to embrace all of them;<sup>24</sup> and the United Netherlands, 1576-1746, composed of the Dutch provinces. The two best-known modern examples of confederations were the United States of America from 1781 to 1789 and the German Confederation, 1815-1867. The former turned out to be little more than what the articles of union described it to be, namely, a "firm

<sup>20</sup> Hart, "Introduction to Federal Government," p. 32.

<sup>21</sup> By Freeman, for example, in his "History of Federal Government" (1863). For other historical accounts of early federations see A. B. Hart, *op. cit.*, and LeFur und Posener, "Bundesstaat und Staatenbund," secs. 4-14.

<sup>22</sup> Hart, *op. cit.*, pp. 40-41.

<sup>23</sup> Bryce, "Holy Roman Empire," specially pp. 340-365; Schulze, "Deutsches Staatsrecht," secs. 26-34.

<sup>24</sup> Calvo, "Droit international," vol. I, sec. 55.

league of friendship." among the states composing it. It was expressly declared in the articles of agreement that each member of the confederation retained its sovereignty, freedom, and independence and every power, jurisdiction, and right not expressly delegated to the confederation.<sup>25</sup> Its avowed object was to provide common protection against attack upon any or all of the states.<sup>26</sup> The collective will of the confederation was ascertained and expressed through a congress of delegates constituted without any reference to the populations of the component states. No common administrative or judicial organs were created, the enforcement of the resolutions of the congress being left to the individual states. The powers conferred upon the general congress were so meager and the means of enforcing its will so inadequate that it perished, to use the language of De Tocqueville, through the excessive weakness of its government.<sup>27</sup>

**The German Bund, 1815-1867.**—The German Confederation embraced at first thirty-eight states of varying rank and importance—kingdoms, grand duchies, principalities, and free cities. It was declared to be a "perpetual league" for the purpose of preserving "the external and internal security of Germany and the independence and inviolability of the confederate states." The collective will of the members was expressed through a Diet of plenipotentiaries which sat at Frankfort under the presidency of Austria. They were appointed by the governments of the states which they represented, and voted according to instructions. The Diet had the power to send and receive ambassadors, to declare war and conclude peace in the name of the confederation, and, under certain conditions, to intervene in the affairs of the individual states. Each state, however, retained the right of legation and could enter into foreign alliances, provided they were not directed against the security of the confederation or of any one of the component states. In case war was declared by the confederation, no state could conclude peace without the consent of the confederation. No member of the confederation could make war against another member, and in case of differences between them the disputes were to be submitted to the decision of the Diet. There was an imperial court which had a limited jurisdiction, but there was no common

<sup>25</sup> Articles of Confederation, Art. II.

<sup>26</sup> *Ibid.*, Art. III.

<sup>27</sup> "Democracy in America" (English translation by Reeves), vol. I, p. 168.

administrative machinery, the enforcement of the resolutions of the Diet being left mainly to the individual states.

**The Central American Federation, 1907-1918.**—A recent example of a confederation was that formed in 1907 by the five Central American states of Guatemala, Costa Rica, Honduras, Nicaragua, and Salvador. It differed from all previous confederations in respect to the objects which it was created to accomplish and in the instrumentalities through which they were to be achieved. It was based upon seven international conventions concluded at Washington in November, 1907. The most important of these provided for the establishment at Cartago of a Central American Court of Justice, an agreement to submit to this court for a period of ten years all disputes of whatever character arising between two or more of the member states, which could not be settled by diplomacy, an agreement to establish an international Central American Bureau, and provision for annual conferences for a period of at least five years. Unfortunately the confederation came to an end in 1918 at the expiration of the ten-year period for which it was created, this in consequence of a decision of the court holding the Nicaragua had violated the rights of the other Central American states by a treaty which she had entered into with the United States in 1914. Nicaragua refused to abide by the decision and the United States, silently at least, supported Nicaragua in her refusal.<sup>28</sup>

There remains to-day no example of a confederation in the sense in which the term has been defined above. Experience has demonstrated the inherent weakness of this type of union; it represents a transitory stage of political development; and those which have existed in the past have all disappeared through the consolidation of their member states either into federal unions or unitary states.<sup>29</sup>

<sup>28</sup> See Munro, "The Five Republics of Central America," pp. 218 ff.; Hicks, "The New World Order," pp. 87 ff. and 171 ff.; Buell, "International Relations," pp. 232 ff. and 581 ff.; and Rey, "L'Union Centre-Américaine," *Rev. de droit int. Pub.*, vol. XVIII, pp. 69 ff.

<sup>29</sup> There has recently been considerable discussion in favor of the union of the Scandinavian states, Denmark, Norway, Sweden, including also Finland and Iceland, into a confederation or federal union, and various proposals for that purpose have been made. The union between Great Britain and her self-governing dominions (Canada, Newfoundland, Australia, South Africa, New Zealand, and the Irish Free State) has been mentioned as a type of relationship which approximates in

#### IV. FEDERAL UNIONS

**Examples of Federal Unions.**—Where several states unite themselves together under a common sovereignty and establish a common central government for the administration of certain affairs of general concern, or where a number of provinces or dependencies are by a unilateral act of their common superior transformed into largely autonomous self-governing communities, we have a federal union, or as is often said, a federal state.<sup>30</sup> The English historian Freeman, writing in 1863, said that the four most famous federal commonwealths of history were the Achæan League in the later days of ancient Greece, the Confederation of Swiss cantons from 1291 to the present, the United Provinces of the Netherlands, 1579-1795, and the United States of America, 1789-1863, which Freeman predicted was at that time nearing its end. The first and last mentioned, he said, represented the "most perfect development of the federal principle which the world

some measure that of a Confederation, and Mr. Lloyd George has been quoted as saying in 1920 when he was prime minister that the British Empire was "a free, equal, and loyal association of the nations of the British Commonwealth, under the sceptre of a common sovereign." Fauchille, *op. cit.*, p. 255. At the imperial Conference at London in 1926 the participating governments agreed that the Dominions and Great Britain "are autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." The parties to this agreement were Great Britain, Canada, Australia, New Zealand, the Irish Free State, India, and Newfoundland. Clearly, however, this is not a confederation in the sense in which the term has been employed above.

The federation of the Russian Soviet republics is likewise regarded as a species of Confederation. Fauchille, *op. cit.*, p. 253.

<sup>30</sup> The literature dealing with the so-called federal state is very extensive. The following treatises contain the fullest and most satisfactory discussion: LeFur und Posener, "Bundesstaat und staatenbund," especially pp. 186-317; LeFur, "L'état fédéral et confédération d'état" (1897); Brie, "Theorie der Staatenverbindungen," pp. 95 ff.; also his "Der Bundesstaat"; Carré de Malberg, "Théorie générale de l'état" (1920), vol. I, pp. 95 ff.; Fauchille, "Droit international public" (1922), vol. I, pt. I, pp. 245 ff.; Jellinek, "Staatenverbindungen," pp. 253-314; also his "Recht des mod. Staates," ch. 21, sec. 5; Borel, "Etude sur la souveraineté et l'état fédératif"; Westerkamp, "Staatenbund und Bundesstaat"; Freeman, "History of Federal Government"; Hart, "Introduction to Federal Government"; Dicey, "Law of the Constitution," ch. 4; Willoughby, "Nature of the State," ch. 10; also his "Fundamental Concepts of Public Law," pp. 188 ff.; Kunz, "Die Staaten Verbindungen" (1929), ch. 16, and Durand, "Les états fédéraux" (1930).

has ever seen," though there were several ancient confederations "whose constitutions must have realized the federal idea almost as perfectly as the more famous league of Achaea.<sup>31</sup>

Since the publication of Freeman's "History of Federal Government" a goodly number of federal unions have been established in various parts of the world. The most important of these are : the Dominion of Canada (1867) ; Germany (1871), considerably modified in 1919 ; the reorganized Swiss republic (1874) ; Brazil (1891) ; the Commonwealth of Australia (1900) ;<sup>32</sup> and the Republic of Austria (1920).<sup>33</sup>

**Nature of the Federal Union.**—The historian Freeman, who employed the terms "federal government" and "federal state" without discrimination, said, "The name federal government may be applied to any union of component members where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of mere municipal freedom."<sup>34</sup> Again, he observed that a "federal commonwealth in its perfect form is one which forms a single state in its relations to other nations, but which consists of many states with regard to its internal government."<sup>35</sup> It represents a combination of both

<sup>31</sup> "History of Federal Government," p. 7.

<sup>32</sup> Fauchille (*op. cit.*, vol. I, p. 256) denies that the Dominion of Canada and the Commonwealth of Australia can be properly regarded as "federal states" because they do not have complete control of their foreign relations. Nevertheless, since they are virtually independent, there would seem to be no practical reason why they should not be considered as states and they certainly do have a federal system of government. The fact that they do not yet have absolutely complete control of their foreign relations does not deprive them of their character as federal unions.

<sup>33</sup> The Mexican federal system was established in 1857, and that of Argentina in 1860. The states of Bolivia, Ecuador, Colombia, Chile, and Peru still remain, unitary centralized republics.

<sup>34</sup> "History of Federal Government," pp. 2-3.

<sup>35</sup> "History of Federal Government," p. 91. Compare the definition of Jellinek, "Staatenverbündungen," p. 278; and "Recht des mod. States" (French translation, vol. II, p. 540), where a "federal state" is defined as "a sovereign state formed out of several states, the power of the former being derived from the states which compose it, and which latter are bound together in such manner as to form a political entity; it is an association of states which.....has as a result the institution of a sovereign power superior to the associated states but in which, however, the latter participate"; also the definition of LeFur und Posener

unitary and federal principles. It is *unitary* in so far as the central government possesses and exercises exclusively throughout the national territory certain powers of its own ; it is *federal* in so far as there is a division of power between the central government and the governments of the various states or other territorial circumscriptions which form the union. It may be added that there has been a steady tendency in recent years in all federal unions toward the unitary principle, that is, they have tended to become, through the process of centralization, more and more unitary in character and less and less federal.<sup>36</sup>

Ordinarily the distinguishing marks of a federal union are : first, the existence of a number of political communities (states, cantons, provinces, territories) possessing of right their own constitutions and forms of government, and being supreme within a certain more or less extensive sphere ; and, second, a common constitution and government, for the direct administration of certain general concerns. Unlike a confederation, a federal union is not a mere league of independent states associated together for purposes mainly of common defense, but it is a union resulting from the merger of a number of political communities for the regulation of various matters common to all the component members. It is a sort of composite state, not a band of states connected together by international agreement. The act by which a federal union is established is not a mere compact, but a constitution. It is sometimes said that it rests upon international contract or treaty among the several states forming it.<sup>37</sup> Other writers like LeFur, Jellinek, and Haenel maintain that there are two phases or stages in the formation of a federal union : an international stage and a constitutional stage.<sup>38</sup> According to them the definitive formation of the union (the constitutional act) is preceded by a treaty of union (the international act). This, however, may or may not be the actual procedure. It was true of the foundation of the North German federal

(*op. cit.*, p. 15) : "Im Bundesstaaten haben die Einzelstaaten einen verfassungsmässig bestimmten Anteil an der Bildung des höchsten Willens des Staates. Im Bundesstaat ruht die Souveränität nicht bei einem Gliederstaate, sondern bei der Zentralgewalt, welche von den Gliederstaaten verschieden ist."

<sup>36</sup> Compare Carré de Malberg, *op. cit.*, vol. I, pp. 119-121.

<sup>37</sup> See, for example, Oppenheim, *op. cit.*, vol. I, p. 157, and Meyer, "Lehrbuch des deutschen Staatsrechts" (6th ed.), pp. 175-176.

<sup>38</sup> Carré de Malberg, *op. cit.*, vol. I, p. 136.

union of 1867, for it began by a treaty of August 6, 1866, by which the North German states bound themselves to establish a federal union, and which was followed by the adoption of a constitution of the union. But this was not the procedure followed by the states which formed the federal union of the United States. The formulation of the constitution was never in fact preceded by a treaty of union. Nor was this procedure followed in the establishment of the federal union of Brazil. Originally a unitary state, it was decomposed into a federal union by a unilateral act of constitutional decentralization. In neither case, therefore, did the process assume an international character.

In its external relations a federal union resembles a "real union," while internally it bears some resemblance to a confederation. On its international side, observes Hall, it is marked by a central government to which the conduct of all external relations is confided and by the absence of any right on the part of the states to separate themselves from it.<sup>39</sup> It differs from a confederation in the character and degree of the relationship subsisting between the members composing the union and in the possession by the former of a central organization endowed not only with practically exclusive powers in relation to foreign affairs, but also with important powers of government as regards internal affairs of common concern. In a federal union the component parts are subject to a common sovereign, and collectively they form a single united state. In a confederation the parts have no common sovereign, and they do not constitute a single political society, but each is itself a sovereignty. In the federal system there is but one real state, one central government, and a number of local governments; in short, the state is coextensive in organization with the organization of the central government. In a confederation, on the contrary, there are as many states as there are component members.

**Types of Federal Unions.**—Some writers, like Freeman, De Tocqueville, John Stuart Mill, Wheaton, and the authors of "The Federalist," distinguished between *perfect* and *imperfect* federal unions. The difference is one mainly of degree. The former is one which

<sup>39</sup> "International Law," 3d ed., p. 26. See also Jellinek, who remarked that the lack of power on the part of the component members of a federal state to secede therefrom follows from the juristic nature of the union. "Staatenverbindungen," p. 298.

contains no elements of confederatism. It is one in which the central government is fully supreme in all external affairs and in certain specified internal affairs of general concern; which acts directly and immediately upon all individuals within the federation; and which possesses the power and means of enforcing its own declared will. This is what the German writer Brie calls the "ideal federal state."<sup>40</sup> An imperfect federal union is one in which remnants of confederatism survive, one, in short, which is organized more like a confederation than a unitary state. The component states possess a limited power in the management of foreign affairs; the acts of the central government are enforced by the individual state governments and "its powers consist simply in issuing requisitions to the state governments when, within the proper limits of the federal authority, it is the duty of these governments to carry it out."<sup>41</sup> The German Empire of 1871-1919 was an example of what has been called an imperfect federal union. The states composing the Empire retained a limited right of legislation and of military administration, while the execution of the laws of the Empire devolved largely upon the separate state governments. Certain of the states, moreover, were accorded important special privileges of which they could not be deprived without their own consent. These and other features gave it a confederate character in a more marked degree than was found in any other existing federal system. By the constitution of 1919 the German federal union was reorganized and transformed to such an extent that it is now doubtful whether it may properly be regarded as a federal union at all. Not only were the members of the union (the *Reich*, as it is officially styled) deprived of the name of states (*Staaten*)—they are now called *Länder*, the literal English translation of which is "lands"—but their competence or sphere of action was greatly restricted; they are no longer free to determine their own forms of constitution and government; extensive powers which formerly belonged to them were handed over to the central government of the *Reich*, and as to many powers left to them the central government may lay down general legislative norms or principles which must be followed; they are no longer free to regulate their own suffrage; and the distribution of the powers of

<sup>40</sup> "Der Bundesstaat," p. 140.

<sup>41</sup> Freeman, "History of Federal Government," p. 11.

government between the *Reich* and its territorial subdivisions may be altered at the will of the central government. There is, therefore, no constitutional guarantee of their autonomy such as is usually considered to be an essential characteristic of a federal union. As under the old constitution, the central government depends in large measure upon the local governments for the execution of its powers, but the latter are, when charged with this duty, subject to the supervision and control of the central government. In reality, therefore, the present German union more nearly approximates the character of a unitary state than that of a federal union when judged by the American standard. From the status of a federal union of a highly confederate character it has passed very nearly to the opposite extreme, that of a centralized unitary state.<sup>42</sup> The new federal republic of Austria is a close imitation of the German form, in which the unitary element is very prominent. Neither has the true federal system of organization. The republic of the United States possesses, like the old German Empire, though to a less extent, some of the characteristics of a confederation. This was first pointed out by Madison, who showed that the constitution in its method of adoption, ratification, and amendment, as well as in the organization of the Senate, was confederate in principle, while as regards the sources of the powers of the government, the organization of the army, and the execution of the laws it was federal in character.<sup>43</sup>

In its normal form the government of a federal union, as has been said, acts directly upon individuals rather than upon the component state organizations; its will is not therefore exerted through the medium of the local governments. Unlike the confederation, there is a general as well as a local citizenship. If war breaks out among the component states, it is civil war, not international war. The component parts of a federal union may themselves be monarchies, or

<sup>42</sup> German commentators are fairly equally divided in opinion as to whether the present *Reich* is a real federal union or a unitary state. See Brunet, "The New German Constitution" (English translation by J. Gollomb, 1922), p. 70, and Oppenheimer, "The Constitution of the German Republic" (1923), pp. 34 ff.

<sup>43</sup> *The Federalist*, No. 39, where Madison distinguished between what he called the "federal" and "national" elements in the origin, structure, and operation of the government of the United States. See also, Woodburn, "The American Republic," pp. 65-70; Brie, "Der Bundesstaat," pp. 105 ff.; and Jellinek, "Staatenverbindungen," p. 300.

republics, or both ; or they may be mere provinces, cantons, territories, or colonial dependencies. Thus, the old German federal empire was composed of kingdoms, grand duchies, duchies, principalities, and free cities, but under the present constitution all members of the union must be republics. Switzerland is a federation of cantons, some of which have governments organized on the representative principle, while others are pure democracies. The federal union of the United States is composed partly of republics called "states," and partly of dependencies called "territories." All the component states are on a footing of equality, none of them enjoying special privileges such as existed in the former German Empire. In Canada the component parts are simply provinces with more autonomy than belongs to provinces of unitary states. In Australia and the Latin American federal unions they are officially described as "states" (Spanish, *estados*).

**Are Members of Federal Unions States ?**—The communities of which federal unions are composed are not states in the strict sense of the term, though in most federal systems they are officially designated as such. In most cases these communities were originally sovereign and independent states, and when they became federated they naturally retained the name, a good deal of the dignity, and even some of the powers of sovereign states. But in reality, by the act of federation they lost their sovereignty and with it that quality which most distinguished them as states. By merging their separate existences into a new and larger personality they became in strict law mere territorial circumscriptions of the new state thus formed, yet withal retaining a degree of local autonomy and of political importance which is not enjoyed by the administrative subdivisions of a unitary state. Unlike the latter they have, as of right, their own constitutions, their own political arrangements, and the right to participate in the collective will. Their status is neither that of a state in a confederation nor that of a province or department in a unitary state.<sup>44</sup>

<sup>44</sup> Compare LeFur, *op. cit.*, pp. 600 ff., 652 ff. and 689 ff. LeFur denies that the members of federal unions are real states. Yet he points out that they are not on the same level with the provinces, departments, or communes of a unitary state. He criticizes the view of Borel (*op. cit.*) that there is no juridical difference between them and the administrative districts of a unitary state. See also Carré de Malberg, *op. cit.*, vol. I, pp. 130 ff., and the opinions there cited, and Duguit, *op. cit.*, p. 127, where LeFur's view is approved.

Unfortunately there is no term by which this status can be appropriately designated.<sup>45</sup>

While the view here expressed is that the component parts of a federal union are not in reality states, many writers, particularly among the Germans, hold the contrary opinion. They maintain, as stated in an earlier chapter (p. 182), that since the members of a federal union possess all the attributes and characteristics of real states except that of full sovereignty, they may properly be treated as states, rather than as mere administrative circumscriptions. Among the German writers who take this view are Laband, Jellinek, Brie, Rosin, and Seydel. Laband, in explaining the juridical nature of the former German federal empire, attributed to the component members the character of real states, while at the same time denying to them the possession of sovereignty.<sup>46</sup> His doctrine was based on the view that the essential characteristic of a state is not sovereignty, but rather the power to command and enforce obedience, and since the individual members of a federal union possess such power, they may be rightfully designated as states. But it may well be observed that if the power to lay down commands and compel obedience be a correct juristic test of the state character, it is difficult to avoid the conclusion that a province or a municipality has an equal claim to be considered a state. The possession of mere local autonomy or independence of action in certain matters—mere power in a local organization to express a will and enforce its commands—is not a mark of statehood. If a non-sovereign community may be rightfully treated as a state, the distinction between states and mere administrative districts disappears or becomes very indistinct. If, however, by the power to command and compel obedience, is meant only original, undervived, and independent power, then that is undoubtedly sovereignty—a power which the component parts of federal unions certainly do not possess.<sup>47</sup> The individual

<sup>45</sup> Burgess in his "Political Science and Constitutional Law" suggested and himself employed the term "commonwealth," but it has not found favor with political writers and jurists. It is employed in the contrary sense to designate the Australian federal union and recently it has come into popular use as a descriptive term for the British Empire (the British "Commonwealth of Nations").

<sup>46</sup> "Staatsrecht des deutschen Reiches," vol. I, pp. 75 ff.; see also Jellinek, "Lehre von den Staatenverbindungen," pp. 298, 307.

<sup>47</sup> Compare Burgess in the *Political Science Quarterly*, vol. III, p. 128; Duguit, "Droit constitutionnel," vol. I, pp. 126 ff., Carré de Malberg, *op. cit.*, vol. I,

members of a federal union have no power to determine their status in the union of which they are a part, or to alter their relations with one another or with the union, or to determine the extent of their own jurisdiction or sphere of action. That power in the last analysis lies outside their jurisdiction, and wherever it resides, there is the state. In international relations they are non-entities; in internal affairs they are, legally speaking, nothing but widely autonomous, largely self-governing territorial units. Juristically speaking, the difference between them and other political entities or administrative districts is largely one of degree. In many American states, cities and sometimes counties are guaranteed by the constitution a large degree of local autonomy and self-government and these therefore, according to the German doctrine, might equally claim to be regarded as states. Whatever the historical process by which federal unions are created, whether, as Lincoln asserted of the American federal republic, they are older than the component parts or the reverse, the parts are the creations of the will of the people as a whole, and they continue to exist subject to that will. If they existed prior to the establishment of the union, they were re-created by the act through which it came into existence and were reinvested by it with the powers which they subsequently possessed.<sup>48</sup>

Many writers have attempted to explain the relation between a federal union and its parts by attributing a portion of sovereignty to each. This theory assumes that sovereignty is capable of being divided and distributed at will. According to this view the state formed by

pp. 125 ff., and Willoughby, "The Fundamental Concepts of Public Law," pp. 254 ff.

<sup>48</sup> Compare LeFur, "L'état fédéral," p. 680; Duguit, *op. cit.*, p. 127; Borel, "Etude sur la souveraineté," p. 103. The late Woodrow Wilson, while admitting that the members of federal unions have lost their power of self-determination with respect to their law as a whole, and that their sphere is limited by the powers of the state superordinated to them, asserted, nevertheless, that they are states because "their powers are original and inherent, not derivative; because their political rights are not also legal duties; and because they can apply to their commands the full imperative sanctions of law." "An Old Master and Other Essays," pp. 93-94. But, as we have seen above, their powers are not original and underived. What would Mr. Wilson have said of the powers of the component members of the Canadian federation, where the powers of the provinces are delegated rather than reserved, or of those of the Brazilian and Mexican federal unions, where the individual states were never sovereign but were mere provinces or administrative districts of a unitary state?

the union of the parts is sovereign in respect to those matters which by the constitution are committed to its care, while the component members are equally sovereign with respect to those matters intrusted to them. In other words, each is sovereign within its constitutional sphere. If, they argue, the component members are sovereign, then the union is merely a confederation ; if, on the contrary, they are non-sovereign, the state is unitary ; since they are neither wholly the one nor the other in a federal union, they must be partly sovereign and partly non-sovereign. This view has been ably defended by such scholars as Waitz, Meyer, Schulze, Bluntschi, Gerber, Rüttimann, Von Mohl, and Treitschke in Germany ; by Freeman and Oppenheim in England ; by De Tocqueville in France ; by Rivier in Belgium ; and by Kent, Story, Cooley, and others in America. It is also the view that has been uniformly maintained by the United States Supreme Court.<sup>49</sup> This doctrine has already been considered in the chapter on "Sovereignty" (*supra*, p. 163), and the opinion was there expressed that sovereignty is a unit and cannot be divided and that what is divided in a federal union is nothing more than the powers of government. Sovereignty is in the federation itself, that is, in the state formed by the union, and what is retained by the component members is merely local autonomy in respect to certain matters. This is the view of the vast majority of jurists and political scientists to-day.<sup>50</sup>

**How Federal Unions Are Created.**—Federal unions have been created in one of two ways : first, and this has been the usual procedure, they have been formed by a voluntary coalescing of a number of sovereign and independent states ; or, second, the federal system has been established by a process of decomposition or decentralization as where a centralized unitary state has been "federalized" by a unilateral constitutional act by which its provinces were erected into autonomous states and the competence and powers of the former divided with the latter. In such a case the establishment of the federal system is not the result of the concurrent action of the component members

<sup>49</sup> See, for example, the decision of the court in the License Cases (5 How.), where the general government and those of the states were spoken of as "separate and distinct sovereignties, each acting separately and independently of the other within their respective spheres." Compare also Lowell, "Essays on American Government," chapter on "Sovereignty."

<sup>50</sup> See the review in Carré de Malberg, *op. cit.*, vol. I, pp. 137 ff.

but is due to the initiation and action of the central government of the unitary state which is thus transformed into a federal union. An example of the latter method was furnished by the creation of a federal republic out of the provinces of the Empire of Brazil in 1889.<sup>51</sup> A somewhat similar procedure was that by which the colonial provinces of British North America and the Australian colonies were federated in 1867 and 1900 respectively. In both cases the federation was constructed, not out of already existing independent states, as was the case in the United States and Germany, but out of a group of colonial dependencies.<sup>52</sup>

**Essential Conditions and Elements.**—Two conditions, observed Dicey, must be present in the formation of a federal union: first, there must be a body of communities (states, cantons, colonies, provinces) connected by locality, history, race, or the like, capable of bearing, in the eyes of their inhabitants, an impress of common nationality; second, there must exist a "very peculiar sentiment" among the inhabitants; that is, they must desire union without unity, must be able to adjust the conflicting ideas of union and separation and to reconcile the advantages of national union with the disadvantages of a division of a power and diversity of legislation. There must be a wish to form for many purposes a single state without surrendering the individual existences of each. A "federal state" indeed is nothing more than a "political contrivance intended to reconcile national unity and power with the maintenance of state rights" through an adjustment satisfactory to both elements.<sup>53</sup> The history of federal unions shows that they have generally been formed under the pressure of international necessity rather than under that of internal needs.<sup>54</sup>

Whatever the method of procedure by which a federal union is established, there must be a common organic act or constitution defining the relation between the union and the parts of which it is composed, and marking out for each its own sphere of action. This constitution

<sup>51</sup> James, "The Constitutional System of Brazil" (1923), pp. 8 ff. The Mexican, Argentine, and Venezuelan federal unions were formed by a similar process.

<sup>52</sup> On the methods of forming federal unions see Brie, "Theorie der Staatenverbindungen," pp. 128 ff.; and Jellinek, "Staatenverbindungen," pp. 253-275.

<sup>53</sup> "Law of the Constitution" (second edition), pp. 129-132.

<sup>54</sup> Compare Martens, "Traité de droit international," vol. I, p. 326.

must be paramount to the constitutions of the component members, otherwise the maintenance of the federation intact will be impossible. It is also essential that it should be a written instrument. The foundations of a federal state, to quote Dicey again, rest on a "complicated contract," and the arrangements which it establishes cannot safely be left to mere understanding or convention, as is possible in a unitary state. It not only should be written, but also should possess a certain degree of rigidity ; that is, it should be incapable of alteration by either the central or local governments.

Finally, it is almost necessary that there should be a common tribunal empowered to interpret the prescriptions of the federal constitution, to judge of the limits of the respective spheres of the central and local governments, and to hold in restraint the tendencies of each to encroach upon the domain assigned by the constitution to the other. This tribunal should have the final decision of all controversies among the component states themselves and of all constitutional disputes between them and the central government, and it ought to have also the power to set aside the provision of any local constitution or law which is inconsistent with the constitution or laws of the union<sup>55</sup>. Without some

<sup>55</sup> As is well known, the Supreme Court of the United States has this power. It is a sort of arbiter or umpire between the union and the component states, holding each strictly within the sphere marked out for it by the federal constitution. In the old German Empire (1871-1919) the supreme court (*the Reichsgericht*) claimed and exercised the power to declare null and void *state* statutes which were in conflict with the constitution or laws of the Empire. See the authorities cited in my article entitled "The German Judiciary," *Pol. Sci. Quar.*, vol. XVIII, p. 259. The present constitution of Germany (Arts. 13, 19) confers upon the supreme judicial court the power to pronounce the nullity of a local law which is in contravention with the laws of the *Reich* and to decide controversies of a public nature which may arise between the *Reich* and its component members or between two or more of the latter. The central ministry is also authorized to veto laws of the individual states which deal with matters over which the *Reich* has jurisdiction.

The constitution of the new Austrian federal republic (1920) confers upon the supreme constitutional court the power to pass judgment upon the constitutionality of the laws of the member states upon the request of the federal ministry (Art. 140). The supreme court of Brazil has substantially the same jurisdiction as that of the United States to pass upon the constitutionality not only of state laws and executive acts but also of federal laws (Art. 59). See James, *op. cit.*, pp. 33, 106. The Swiss federal court has jurisdiction to suits between cantons, between the confederation and cantons, between a canton and citizens of another canton, and of conflicts of competency between the confederate authorities and those of the cantons (Arts. 110, 113). The supreme court of Mexico has juris-

such arbiter or umpire the maintenance of the federal system would be difficult.

## V. INTERNATIONAL ADMINISTRATIVE UNIONS

**Nature and Purposes.**—Many states have associated themselves together to form what has been styled "public international unions," or more specifically "international administrative unions," for the promotion, administration, or supervision of certain common interests (largely non-political) which in the course of the development of international society have ceased to be local or national. Unlike the other types of union described above, they are formed not for the general purpose of government or for purposes of defense but rather for the regulation or care of particular interests or services, and unlike federal unions they are always formed by treaty or international agreement among the parties. They are therefore purely international and not constitutional creations.

**Examples and Types of Such Unions.**—As a result of the increasing interdependence among the different states of the world and consequently the necessity of organized co-operation among them for the better advancement of their common economic and other interests, such unions have greatly multiplied in recent years, so that actually there are more than thirty of them in existence to-day. The agency through which each union acts is usually an international office, bureau,

diction of controversies between the individual states, and of all questions arising out of federal laws or acts which encroach upon or restrict the "sovereignty" of the states and of all or any of the laws or acts of the states which invade the sphere of federal authority (Arts. 98, 101). The jurisdiction of the supreme court of Argentina is substantially the same as that of the supreme court of the United States (Arts. 100, 101).

The constitution of the Commonwealth of Australia declares that when a state law is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid (Art. 109).

The British North America Act of 1867, which serves as the constitution of Canada, is silent on the question, but in both Canada and Australia acts of the local legislatures which are inconsistent with the acts of parliament establishing the unions, or with dominion or commonwealth legislation, will be pronounced null and void. See Munro, "The Constitution of Canada," pp. 5, 21<sup>9</sup>, and Moore, "The Commonwealth of Australia," ch. 10. The general subject of judicial control over legislation is more fully discussed in the chapter on the Judiciary, *infra*.

commission, committee, conference, or congress established in pursuance of the treaty or convention creating the union, and having its seat usually at Geneva, Bern, Brussels, Paris, or Rome.<sup>56</sup> The various unions may be grouped into classes either on the basis of the nature of the particular interests which they were designed to promote, or on the basis of the form and powers of the central organs through which they function. Some of them deal with international communication and transportation, such as the Universal Postal Union, the telegraphic union, the radio-telegraphic union, the European unions for railway freight transportation, and for the standardization of railways, etc. Some are concerned with other more distinctly economic and industrial interests, such as the International Metric Union, the unions for the protection of literary, artistic, and industrial property; the International Institute of Agriculture; the international union for the publication of customs tariffs; the International Sugar Union; and the International Labor Office of the League of Nations. Others are concerned with matters of public health, such as the International Sanitary Union and the International Office of Public Health. Others, still, were created to promote various interests relative to police, penology, the suppression of crime and vice, etc., such as the union for the regulation of the traffic in liquor in Africa, the International Opium Commission, the unions for the suppression of the slave trade, the

<sup>56</sup> Potter, in his "Introduction to the Study of International Organization" (1922), p. 271, gives a list of thirty-nine such unions, commissions, offices, bureaus, etc., which had been created down to 1915. A number have been established since that year, such as the International Air Commission (1919), the International Labor Office, (1920), the International Hydrographic Bureau (1919), the International Association for the Promotion of Child Welfare (1924), and the International Bureau of Patents (1920). As to such unions generally see in addition to Potter's work cited, Reinsch, "Public International Unions" (1911); Woolf, "International Government" (1916); Sayre, "Experiments in International Administration" (1919); Hicks, "The New World Order" (1920), ch. 18; Oppenheim, "International Law" (3d ed., 1920), vol. I, pp. 751 ff.; Poinsard, "Etudes de droit international conventionnel" (1914), and his "Les unions et ententes internationales" (2d ed., 1901); and Neumeyer, "Internationales Verwaltungsrecht" (3 vols., 1910). See also a valuable article by Mr. D. P. Myers entitled "Representation in Public International Organs," *Amer. Jour. of Int. Law*, vol. VIII (1914), pp. 81 ff. An excellent up-to-date discussion, with a valuable bibliography, by an eminent German jurist will be found in the lectures by Professor Wilhelm Kaufmann before the Academy of International Law in 1924, entitled, "Les unions internationales de nature économique," *Recueil des Cours* (1924), vol. II, pp. 181 ff.

white slave traffic, and the circulation of obscene publications. Others still, were formed for the purpose of promoting common scientific interests, such as the International Geodetic Union, the Council for the Exploration of the Sea, the International Seismological Union, the Union for the Standardization of Electrical Units, the Pan-American Scientific Congress, etc. In addition, there are various other unions for the advancement of common interests of one kind or another, among which may be mentioned the Interparliamentary Union, the Pan-American Union,<sup>57</sup> etc. The number of states which are members of these unions varies. Some of them, like the Universal Postal Union, embrace practically all the civilized states of the world, while others are confined to the states of a particular continent, such as the several European unions and the Pan-American Union.

**Organization.**—So far as the nature and powers of their organs are concerned there is little uniformity. Most of them, as has been said, maintain a bureau, office, or commission in some European city, each with a permanent staff of employees; most of them have a general assembly, sometimes called a conference, sometimes a congress, which meets periodically or upon call of the parties, and at which each signatory party is represented by a delegate or delegates. The permanent offices or bureaus are largely clearing houses for the collection and distribution of information, but some have limited powers of administration.

The conferences or congresses are mainly bodies for discussion and mutual exchange of opinion. They prepare regulations and sometimes drafts of conventions for the consideration of the member states. None of them have the power to make regulations or enact legislation which is binding upon the signatory governments.<sup>58</sup> The expense for the

<sup>57</sup> The "Pan-American Union" is really the name of the organ and administrative agency of the "union of the republics of the American continent." The union was not created by treaty but is the result of resolutions adopted by various international conferences composed of delegates appointed by the several republics. As to the juridical status of the union see Penfield, "The Legal Status of the Pan-American Union," *Amer. Jour. of Internat. Law*, vol. XX (1926), pp. 257 ff.

<sup>58</sup> The International Sugar Commission comes the nearest to possessing legislative power. While it cannot adopt decisions which are binding upon the signatory governments, it is empowered to determine questions of fact which, when found to exist, make it obligatory upon the member states to introduce certain changes in their legislation relative to bounties on the exportation of sugar. Compare Reinsch, *op. cit.*, p. 51.

maintenance of the international bureaus and other bodies with their staffs of employees is, with some exceptions, borne by the signatory governments on a basis of apportionment usually provided for in the convention creating them.

**Evaluation.**—These various unions were created to meet a situation resulting from the increasing interdependence and unity of interests among the different states of the world. The results achieved have varied. A few have accomplished little or nothing ; occasionally dissatisfied members have withdrawn from them ; but others, like the Postal Union, have performed services of inestimable value to the entire world. The principal reason why the results have in some cases been disappointing is to be found in the very limited power of decision and action which was conferred upon their organs. Whatever the degree of success achieved, they represent interesting experiments in international coöperation, and the wealth of experience which they furnish will be of distinct value in the further evolution of the world in the direction of a more thoroughgoing, all-embracing federation of mankind. The founders of the League of Nations recognized the usefulness of the administrative unions and with a view to coördinating their work and of bringing them under the high patronage of the League, the Covenant (Art. 24) provided that all existing bureaus should, if the parties consented, be placed under the direction of the League and that all bureaus and commissions established in the future for the advancement of common international interests should similarly be placed under its direction.

## VI. THE LEAGUE OF NATIONS

**Members of the League.**—As stated in a previous chapter (p. 53), the League of Nations is an association of states (including also India and the British self-governing dominions which are not states in the full sense of the word). Like the international administrative unions, the League was created by treaty, but it differs from them both in organization and in purpose. It has an organization which gives it certain of the characteristics of a state ; it possesses a juridical personality of its own, it can probably sue in the courts, it owns property, can accept legacies, has a treasury and a budget and

in the Covenant it has a sort of constitution,<sup>59</sup> but it has no territory of its own, no citizens or subjects, no army, navy, or police force, and it lacks that essential element which most distinguishes the state from all other associations, namely, sovereignty.<sup>60</sup> Brought into existence in January, 1920, with a membership of 18 states and other political entities, it had in 1934 a membership of 59, and embraced all the fully independent states of the world with the exception of Afghanistan, Arabia, Brazil, Costa Rica, Egypt, and the United States. Iceland, as stated above, formed in 1918 a personal union with Denmark, to which the conduct of its foreign relations was committed. In 1919 its government addressed an inquiry to the Secretariat as to the possible conditions under which it would be allowed to accede to the Covenant, but it does not appear that any action has been taken on the inquiry. In 1920 the petty states of Liechtenstein, Monaco, and San Marino applied for admission, but the Assembly, evidently feeling that states of such small size ought not to be attached to the League, postponed definitive action on their applications. The applications of Armenia, Azerbaijan, Georgia, and the Ukraine were also denied, although

<sup>59</sup> In 1921 a Swiss court decided that it was incompetent to take jurisdiction of an action attempted to be brought by a Geneva furnisher against the League to recover on a contract between him and the League. As to the juridical character of the League see Hill, "Present Problems in Foreign Policy," p. 111, and especially an illuminating article by M. Grunbaum-Bolin in *Rev. de droit int. pub. et de lég. comparée*, vol. XLIV (1921), pp. 67 ff., who compares the League as a juridical person to the Papacy, which though not a state possesses certain attributes of a state. He suggests that for the purpose of resolving legal controversies which are bound to arise between individuals and the League, it might be well to follow the example of the Papacy in 1882 and establish a special judicial court of its own to hear and determine such cases (p. 81). It may be remarked in this connection that several members of the League now credit permanent diplomatic representatives to the League and there is no reason why the League itself may not appoint at least temporary diplomatic envoys to negotiate with other states.

<sup>60</sup> As is well known, the French designate it officially as the "Society of Nations." Whether the term "society" is preferable to "league" is of little consequence. In either case it is an association. Larnaudie speaks of it as a "syndicate" of states or a *coopérative d'états*. "La Société de Nations" (1920). The Covenant of the League was made an integral part of all the peace treaties, except the treaty of Lausanne, which took the place of the rejected treaty of Sèvres. Ratification of any one of these treaties therefore carried with it admission to the League. Thus China which declined to ratify the treaty of Versailles, became a member through ratification of the peace treaty with Austria.

Armenia would doubtless have been admitted later had it not fallen under the dominion of Soviet Russia.

In considering applications for admission to the League the First Assembly took into consideration such factors as the size and population of the state, whether its government was a recognized *de facto* or *de jure* government, whether it had a stable government with settled frontiers, whether it was fully self-governing, what had been its conduct in respect to its international obligations, etc.

The general principle is that a state once admitted to membership in the League is on a footing of equality with all the other members in respect to its rights and obligations, but an exception was made in the case of Switzerland, which by reason of its perpetually neutralized status which it desired to retain intact, was exempted from the obligation to participate in any military operations which the League might undertake and also from the obligation to allow the passage of troops across Swiss territory in case of armed execution by the League of its covenants. It is understood, however, that she will participate in the economic measures taken by the League against a Covenant-breaking member.<sup>61</sup>

Luxemburg, also a neutralized state, likewise requested to be admitted with an exemption from the obligation to participate in the military operations of the League, although it was willing to allow the passage of troops across its territory and to participate in the economic and financial measures of the League. While the request was under consideration by a sub-committee of the Council the proposed reservations were withdrawn and Luxemburg was finally admitted subject to all the rights and obligations which the Covenant creates.<sup>62</sup> Germany, at the time of her application in 1926 for admission to the League, made known that she desired to be exempted from the possible military obligations of the Covenant, but the exemption was

<sup>61</sup> See Mettial, "La neutralité et la Société des Nations" (1920), especially ch. 2, and Borel, "La neutralité de la Suisse au sein de la Société des Nations," *Rev. gén. de droit int. Pub.*, 1920, pp. 153.

<sup>62</sup> Records of the First Assembly, vol. II, pp. 225 f.; Official Journal, 1921, pp. 706 f. and World Peace Foundation Pamphlet, "The First Assembly of the League of Nations," vol. IV (Feb. 1921), p. 150. The whole matter of membership in the League of Nations is fully discussed by Hudson in *Amer. Jour. of Int. Law*, vol. XVIII (July, 1924), pp. 436 ff. See also my "Recent Developments in International Law" (1925), pp. 621 ff.

not allowed. The Scandinavian states desired a similar exemption in respect to the obligation to participate in the blockade measures of the League, but it was refused.<sup>63</sup> Colombia desired to accede to the Covenant in such a way as to avoid recognition by her of the independence of Panama, which she had never admitted. After some discussion of the matter the Council authorized the Secretary-General to acknowledge the receipt of the Colombian proposal without expressing any opinion on the merits of the point raised.

The question as to whether a state could be admitted subject to conditions not imposed on other members was raised in connection with a proposal that states having racial or linguistic minorities should be required to give guarantees for the protection of such minorities such as had been given by certain states like Poland and Czechoslovakia by means of special treaties. Doubt being felt as to the legality of requiring such conditions, the Assembly adopted a recommendation that thereafter such states applying for membership should enter into the obligation suggested. Finland in her application stated that she was prepared to give such an undertaking and was admitted in pursuance of this understanding.<sup>64</sup>

**Loss of Membership.**—The membership of a state in the League may be terminated in three ways: first, by withdrawal after two years' notice, provided all its international obligations and all its obligations under the Covenant have been fulfilled (Covenant, Art. I). It is not clear to whom the notice shall be given or who is to determine whether the said obligations have been fulfilled, but it is presumably the Council and the Assembly.<sup>65</sup> Second, a state which signifies its

<sup>63</sup> Nevertheless the Assembly approved in 1921 an amendment to the Covenant authorizing the Council to exempt a particular member from such an obligation whenever it considered that the proximity of such member to the Covenant-breaking state would put it in a position of grave danger.

<sup>64</sup> Most of the states which still remain outside the League have co-operated with it in certain of its activities. Several of them are members of the International Labor Organization; some of them are members of the Permanent Court of International Justice; some have participated in various international conferences called by the League, and some of them have ratified international conventions concluded under the auspices of the League; and some of them register their treaties with the Secretariat. As to this participation by non-members see "The Year Book of the League of Nations, 1925" (World Peace Foundation Pamphlets, vol. VIII), p. 391.

<sup>65</sup> In pursuance of this provision Costa Rica ceased to be a member on January 1, 1927. In 1926 Brazil gave notice of her intention to withdraw from

dissent to a duly adopted amendment to the Covenant, automatically ceases to be a member of the League (Art. 26). Third, any member which has violated any covenant of the League may be declared by a unanimous vote of the Council and the Assembly, not counting the vote of the Covenant-breaking member, to be no longer a member (Art. 16). Thus, the right of secession is recognized and the door left open for the voluntary dissolution of the League. The right of the League to rid itself of Covenant-breaking members is also, properly, reserved since the very foundation of the League consists of a series of covenants and hence there can be no place in it for members who refuse to perform their obligations thereunder.

**Objects and Purposes of the League.**—The general purposes for which the League was created are : first, the promotion of international co-operation ; and, second, the achievement of international peace and security. The means by which these ends are to be accomplished are : (1) by the acceptance of obligations not to resort to war, (2) by the prescription of open, just, and honorable relations between nations, (3) by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and (4) by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.

Its powers, or rather those of its organs, are numerous, but they may be classified in a general way as follows : first, those which have to do with the execution of the treaties of peace ;<sup>66</sup> second, those which relate to measures for the prevention of war and the guaranteeing of the security of its members ; third, those which are designed to promote fair and humane conditions of labor throughout the world ; and fourth, those of a miscellaneous character, such as the registration of treaties, the collection and dissemination of information, the supervision of territories under mandate, and the exercise of a sort of trusteeship over the Saar Basin and the free city of Danzig.

the League and in September of the same year Spain gave similar notice. But Spain has since rejoined the League. Argentina withdrew her delegates from the Assembly in 1920, but did not formally withdraw from the League. In 1933 Japan and Germany withdrew.

<sup>66</sup> The treaty of Versailles is said to contain not less than seventy references to the League. Hicks, "The New World Order," p. 51.

## PART II. GOVERNMENT

### CHAPTER XIII

#### FORMS AND TYPES OF GOVERNMENT

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#### I. CLASSIFICATION

**The State and Government Distinguished.**—From an examination of types of states and unions of states we come now to consider the forms and kinds of government, always keeping in mind that the state and its government are, strictly speaking, separate and distinct institutions. The state, as we have seen, is a politically organized community of people independent of external control or nearly so, and sovereign in respect to its internal affairs or at least possessing so

large an autonomy that for all practical purposes it may be regarded as a state. Government, on the other hand, is the organization through which the state manifests its will, issues its commands, and conducts its affairs. While, as pointed out in a previous chapter, all states are alike in their essence, that is, in respect to the component elements which enter into their make-up, and, in general, in respect to their ends and objects, and therefore do not readily lend themselves to differentiation and classification, governments, on the other hand, vary widely in respect to the form of their organization, frequently in respect to their spirit and methods, in respect to the mode in which those who govern are chosen, the nature and extent of the authority with which they are invested, the particular objects which they seek to accomplish, the relations between their legislative, executive, and judicial organs, and various other matters. Attempts to classify them have usually, therefore, been more successful than attempts at the classification of states, for the reason that satisfactory criteria can be found upon which various governments can be grouped into one class and others in a different class in such a manner that the distinction between the different classes subserves both practical and scientific ends.

**Criteria of Classification.**—As in the classification of states, the essential problem is to find the proper criteria. Naturally the political scientist, the jurist, the international lawyer, and the sociologist, each frequently approaching the subject from a different point of view and each emphasizing different characteristics of governments, are not always in agreement as to what these criteria should be. Political scientists themselves are not in accord in respect to the tests which should be adopted. Many classifications which have been proposed have not been satisfactory for various reasons : some of them because they were not based upon any consistent scientific principle ; others because the criterion adopted leads to classifications which are of little scientific or practical value. One difficulty, it may be observed, lies in the fact that in recent times a great variety of new forms of government have come into existence and these are constantly undergoing changes which differentiate them fundamentally from the old forms out of which they evolved. The result is that classifications made in one epoch and satisfactory enough at the time soon become out of date.

## II. MONARCHY, ARISTOCRACY, OLIGARCHY, AND DEMOCRACY

**Classification Based on the Number of Persons Who Exercise Sovereign Power.**—Adopting the same test that is employed in classifying states, namely, the number of persons in whom the supreme and final authority is vested, many writers, especially the older ones, have classified governments as monarchies, aristocracies, and democracies. In its widest sense any government in which the supreme and final authority is in the hands of a single person is a monarchy, without regard to the source of his election or the nature and duration of his tenure. In this sense it is immaterial whether his office is conferred by election (by parliament or people) or is derived by hereditary succession, or whether he bears the title of emperor, king, czar, president, or dictator. It is the fact that the will of one man ultimately prevails in all matters of government which gives it the character of monarchy.<sup>1</sup>

As pointed out in a previous chapter, however, some writers consider monarchy to be a form of government in which the chief of state derives his office through inheritance, according to rules of hereditary succession which in practice vary in different states.<sup>2</sup> It is this characteristic which distinguishes a monarchy from a republic, the latter being a form of government in which the head of the state is elective. Jellinek, as we have seen, defined monarchy as a government by a single physical will and he emphasized that its essential characteristic is the competence of the monarch to "express the highest power of the state." If he is merely a titular chief, his power being actually exercised by others, the government is in reality a republic, whatever may be the title of the chief of state, the source of his election, or the nature of his tenure. Thus, he says, France under the constitution of 1791, although officially

<sup>1</sup> Were England during the Commonwealth and the Netherlands under the stadholders examples of monarchies? Both the protector and the stadholders were elected for life, and both occupied a position in other respects similar to that of a king, although the power of the former was limited by a council of state which represented parliament.

<sup>2</sup> Such is Duguit's definition of monarchy. "Droit Const." (1911), vol. I, p. 393. Bernatzig in his "Republik und Monarchie" maintained that the difference between a monarchy and a republic is that in the former the chief of state has a subjective right to his office, whereas in a republic he has no such right.

characterized as a monarchy, was in reality a republic with a hereditary chief of state.<sup>3</sup> The same might be said of the British monarchy.

**Kinds of Monarchy.**—Considered from the standpoint of the source from which the monarch derives his office, monarchies may be classified as hereditary and elective, or they may be a combination of both. Most monarchies of the past and all of those which now exist were and are hereditary in character; that is, the monarch inherits the crown according to a fixed rule of succession; this may have been determined by the constitution or an act of parliament, or it may have been a rule of the particular dynastic house or family to which the monarch belonged, or it may have been determined partly by the one and partly by the other. The rules have varied in different states. As already stated, instances of so called "elective" monarchies have not been lacking in the past.<sup>4</sup> The early Roman kings were elective and so were those of the ancient monarchy of Poland. The emperors of the Holy Roman Empire were chosen by a small college of electors, usually from the same family. During the Middle Ages elective monarchies were not uncommon, but they usually became hereditary in consequence of the practice of choosing the kings from a particular family. They were not always, however, chosen for life, a practice which Jellinek considered to be contrary to the nature of true monarchy. In early times monarchs were originally chosen or in some form accepted by the people, though the hereditary feature was so strong that the elective principle was gradually pushed into the background.<sup>5</sup> Speaking of the election of the early English kings, Stubbs observed that "the king was in theory always elected and the fact of election was stated in the coronation service throughout the Middle Ages in accordance with the most ancient precedent."<sup>6</sup> "But," he adds, "it is

<sup>3</sup> "Recht des modernen Staates" (French ed., vol. II, pp. 401, 423. Compare also Bryce, "Modern Democracies," vol. II, p. 535, who says: "By monarchy I understand the thing, not the name, *i.e.*, not any state the head of which is called king or emperor, but one in which the personal will of the monarch is a constantly effective, and in the last resort predominant, factor in government." He adds that Norway, while called a monarchy, is not such in fact but is really a democratic republic.

<sup>4</sup> Some writers (*e.g.*, Roscher, "Politik," p. 23) maintain that an elective monarchy is no true monarchy, but a special type of republic.

<sup>5</sup> Compare Woolsey, "Political Science," vol. I, pp. 520-528.

<sup>6</sup> "Constitutional History of England," vol. I, p. 150. Waitz ("Deutsche Verfassungsgeschichte," vol. I, p. 298) pointed out that most of the early German

not less true that the succession was by constitutional practice restricted to one family, and that the rule of hereditary succession was never, except in great emergencies and in most trying times, set aside." In a sense, of course, the English monarchy is still elective, since parliament claims and exercises the right to regulate the law of succession at its pleasure.<sup>7</sup> In the case of several more recently created states, such as Belgium and some of the Balkan states, the first monarchs were chosen by election; their successors inheriting their crowns by hereditary succession. So the new king of Norway was elected by the Norwegian parliament in 1905, following a plebiscite which pronounced in his favor, but thereafter the crown will be transmitted by hereditary succession. In 1903, after the assassination of the king of Serbia, his successor was chosen by the Serbian parliament.

**Absolute Monarchies.**—Considered from the standpoint of their character, monarchies have usually been classified as: (a) absolute, arbitrary, or despotic, and (b) constitutional, parliamentary, or limited. An absolute monarchy is one in which the monarch is not merely the titular head of the state but is actually the sovereign; that is, his will is the law in respect to all matters upon which it is proclaimed. In short, he is bound by no will except his own. Under such a system the state and the government, legally speaking, are identical, the monarch being not only an organ of government, and the sole organ, but also the sovereign. The nature of his power was expressed by the Roman maxim *quod principi placuit legis habet vigorem*, and later by the French version of the same maxim *qui veut le roi, si veut la loi*. The boast attributed to Louis XIV, "I am the State" (*l'état, c'est moi*) was a fairly accurate description of the rôle of a typical absolute monarch.

Examples of absolute monarchies were common in the Middle

monarchies were elective. The right of the reigning king to recommend his successor was recognized, but the people "confirmed, acknowledged, and chose."

<sup>7</sup> William and Mary, for example, were chosen as reigning sovereigns in 1689 by a convention Parliament; and two years later a new law of succession was passed, fixing the crown on a different branch of the royal house from that upon which it would have descended according to the existing rules of succession. The history of other countries of Europe furnishes examples of elective monarchies. Thus Louis Napoleon became emperor of the French in 1852 through the forms of a plebiscite, and a vacancy in the Spanish throne was filled by parliamentary election in 1873.

Ages and some of them survived to a date well on in the nineteenth and even the twentieth century. Among them were the Russian and Ottoman monarchies, and to a less degree those of Prussia, Austria, and Hungary. With the advancing tide of democracy, however, absolute monarchy has completely disappeared from the continent of Europe. In form it still survives in a few more or less backward states of Asia and Africa.

**Limited Monarchy.**—What is usually described as *limited* monarchy is one in which the power of the monarch is restricted by the prescriptions of a written constitution or by certain unwritten fundamental constitutional principles, such as the British monarchy. These constitutional rules or principles define in some degree the powers of the monarch, or limit what is called the "royal prerogative" and usually upon his accession to the throne he is required to take a solemn oath to respect and observe them. In some cases these constitutions, it is true, were not the work of national assemblies representing the people but were framed and promulgated by the monarch himself (e.g., the Prussian constitution of 1850 and the existing constitution of Italy, 1848), but once promulgated it was understood that such of their prescriptions as placed limitations upon the rights and powers of the monarch were in the nature of a contract between him and the people and therefore binding upon him. All the surviving monarchies of Europe and some of those of Asia and Africa, fall within the class of limited monarchies. Those which belong to each class may be and have been subdivided into various types, but the lines of demarcation which separate them are mainly distinctions of degree or of historical development, and little or nothing would be gained by dwelling upon them.<sup>8</sup>

**Aristocracy.**—Aristocracy is usually defined as a form of government in which political power is exercised by the few. Some writers, in the endeavor to be more exact, define it as government by a minority of the citizens. But as thus defined it is not necessarily government by a few, since the minority may be numerically a very large one; the line of demarcation between it and the majority may

<sup>8</sup> Such are the sub-classifications of Bluntschli and others which embrace patriarchal, feudal, Frankish, military, theocratic, and other kinds of monarchy, discussed in Chapter XI, *supra*.

'be so shadowy in fact that the distinction is not sufficient to distinguish the character of a government by the one from that of the other. In fact, in many states regarded as democratic, political power is exercised by a minority of the citizens. Formerly, women had no voice or share in the government, and this is still true in some states. In all countries minors are disfranchised ; in some illiterate persons are excluded from voting ; and in some soldiers, convicted criminals, bankrupts, paupers, and other classes are debarred. It would seem, therefore, to be more exact to define aristocracy as a form of government in which only a relatively small proportion of the citizens have a voice in the choosing of public officials and in determining public policies. It is not practicable to lay down any precise rule as to the size of the minority which would make the government aristocratic in character. The ancient Greeks conceived aristocracy to be government by the *best*. Whether they meant by the *best* those who were the most highly qualified by education, experience, and moral character or those who were superior to the rest by reason of their wealth or social status, is not clear. In either case it would normally be government by the few, though not necessarily so, since a condition of society is conceivable in which the best intellectually, morally, and economically would constitute a majority of the population.

The late Professor Jellinek, who considered aristocracy to be a special form of a more general type which he called "republic," emphasized the *social* aspect of aristocracy. Aristocracy he conceived to be a form of government in which some particular *class* played the dominant rôle. It might be a priestly, military, professional, or land-owning class or several or all of those combined. In any case, they constitute a fraction of the population, juridically distinct from the mass, by reason of certain privileges or rights which they enjoyed. Aristocracy in all its forms, he said, rests upon the existence of a preponderant social element, which is independent as such of the state, and which, politically, exercises domination over the rest.<sup>9</sup>

Aristocracy as a form of government was very common in former times. Many governments popularly described as monarchies were in reality aristocracies. Jellinek recognised two general types : first, those in which the ruling class was entirely separated from the rest of the

<sup>9</sup> *Op. cit.*, (French translation), vol. II, pp. 468.

population so that it was impossible for an individual who did not belong to the ruling class to gain admission to it ; second, those in which there was nothing of a juridical nature to prevent a member of an inferior class from acquiring under certain conditions political privileges reserved for the dominant class. Examples of the first type were hereditary aristocracies ; of the second type were those based upon wealth, education, social prominence, etc.

Rousseau, as is well known, classified aristocracies as natural, elective, and hereditary.<sup>10</sup> By a "natural" aristocracy, he meant a government by those who by their natural ability as leaders, and by education and experience are best qualified to govern ; while by an elective aristocracy he meant a government by the relatively few who are chosen by the whole mass. The "elected" aristocrats might or might not be at the same time the "natural" aristocrats, depending upon the action of the electorate in making their choice.

**Oligarchy.**—The ancient Greeks carefully distinguished between aristocracy and oligarchy. Aristotle defined the latter as a government by the few in their own interests, or more correctly, government by the wealthy : it was therefore a perverted form of aristocracy, which was government by the good or best people of the state.<sup>11</sup> The late Professor Seeley called it a "deranged" or "diseased" form of aristocracy.<sup>12</sup> Popular usage to-day, however, rarely distinguishes between aristocracy and oligarchy, the two terms usually being employed indiscriminately to describe any government in which only a small minority have the controlling voice. But a few writers still observe the distinction. Thus they say the government of Prussia was formerly an oligarchy rather than an aristocracy, but the difference hardly seems

<sup>10</sup> "The Social Contract," bk. III, ch. 5.

<sup>11</sup> "Politics," bk. III, secs. 6, 7. The real difference between democracy and oligarchy, said Aristotle, is poverty and wealth ; whenever men rule by reason of their wealth, whether they be few or many, that is an oligarchy ; and when the poor rule that is a democracy ; as the rich are always few and the poor many. See Jowett's translation, p. 116.

<sup>12</sup> "Introduction to Political Science," lect. VI. Some writers distinguish between aristocracy and oligarchy as follows : aristocracy is government by a *class*, whereas oligarchy is government by a small number of persons who do not, strictly speaking, constitute a class. Compare Pradier-Fodéré, "Principes généraux de droit, de politique, et de législation," p. 241.

important.<sup>13</sup> It was in fact a government in which the so-called junker land-owning aristocracy, together with the other wealthy and bureaucratically trained classes, exercised the controlling power. Whether it was an oligarchy or an aristocracy is largely a matter of definition. This form of government, whether we call it aristocracy or oligarchy, in the sense of being government by a relatively small class, no longer survives in any European country, although, as will be pointed out in a later chapter, the upper legislative chambers in some states are still composed of hereditary elements, of members appointed by the crown, or of members elected by a restricted suffrage. The governments of such countries are therefore in part at least aristocratic.

**Democracy.**—Democracy has been variously conceived as both a political status, an ethical concept, and a social condition. Thus Giddings treats democracy as not only a form of government but also as a form of state, a form or condition of society, or a combination of all three.<sup>14</sup> Some writers emphasize the distinction between political,

<sup>13</sup> The late Lord Bryce in his "Modern Democracies" (vol. II, pp. 537 ff.), without defining oligarchy or distinguishing it clearly from aristocracy, discussed its merits and demerits and called attention to various types, among which he mentioned the feudal states of medieval Europe, the independent Italian and German cities of that age, the British and French "aristocracies" of the eighteenth century, the Prussian bureaucracy from the time of Frederick the Great, France under Napoleon III, the Russian Empire from the time of Nicholas I, and Austria since Joseph II. Oligarchies of the future, he thought, would have to be either a mixture of plutocracy and bureaucracy, or else composed of the leaders of labor or trade organizations. Houghton in his "Bureaucratic Government" (1913), characterizes the government of India as an example of "the most perfect bureaucracy in the world."

<sup>14</sup> "The Responsible State," pp. 19 ff.; "Democracy and Empire," pp. 199 ff. Lord Bryce ("Modern Democracies," vol. I, p. 23) considered that the words "democracy" and "democratic" describe nothing more than a particular form of government, yet he observed that in the United States, Canada, and Australia, particularly, they have "acquired attractive associations of a social and indeed almost of a moral character." Thus a "democratic" person is one who is friendly, genial, or a good "mixer," regardless of his wealth or social status. Particular kings have sometimes been described as "democratic"; some writers have maintained that municipal ownership of public utilities makes a community "democratic"; German writers are not lacking who contend that the old government of Germany was a "democracy" because the state performed a large number of services for the people which in many countries were left to private enterprise. In short, democracy, according to their conception, is a form of government which serves on a large scale the people, whether they have a voice in it or not.

economic (or industrial), and social democracy, and point out that the three things do not necessarily coincide in a given state.<sup>15</sup> Thus a people may be democratic, socially speaking, but may have at the same time an undemocratic government, or *vice versa*. But the normal condition is the coincidence of the three ; that is, if society is democratic in its social and economic life, it will be democratic politically ; on the other hand, if it is sharply differentiated into social classes, it is likely to have a government based, in part at least, upon recognition of special privileges of the upper classes.

Naturally, definitions of democracy as a form of government are multifarious, but like many definitions they are not exhaustive and do not admit of universal application. The ancient Greeks described democracy somewhat generally as government by the "many."<sup>16</sup> Professor Seeley conceived it, in its modern sense, to mean "a government in which every one has a share"<sup>17</sup>—a definition which would, if strictly interpreted, exclude from the category of democracy every existing government and every one which has been known in the past. Dicey defined it as a form of government in which "the governing body is a comparatively large fraction of the entire nation."<sup>18</sup> Lord Bryce, whose knowledge of the forms and workings of democratic governments was perhaps greater than that of any other modern writer, stated that "the word democracy has been used ever since the time of Herodotus to denote that form of government in which the ruling power of a state is largely vested, not in any particular class or classes, but in the members of the community as a whole." He added : "This means, in communities which act by voting, that rule belongs to the majority, as no other method has been found for determining peaceably and legally what is to be declared the will of a community which is not unanimous."<sup>19</sup> This definition of democracy as government by a maio-

<sup>15</sup> Compare Willey, "Recent Critics and Exponents of the Theory of Democracy," in Merriam, Barnes and others, "Political Theories, Recent Times," pp. 46 ff., and Mallock, "The Limits of Pure Democracy," ch. 1.

<sup>16</sup> Compare Aristotle, "Politics," bk. III, sec. 8.

<sup>17</sup> *Op. cit.*, p. 324. James Russell Lowell ("Democracy and Other Essays," p. 37), thinking of democracy as a social system, defined it as that form of society in which "every man has a chance and knows he has it."

<sup>18</sup> "Law and Opinion in England," pp. 50, 52.

<sup>19</sup> "Modern Democracies," vol. I, p. 20. Professor A. B. Hall in his work on "Popular Government" (1921, p. 1) defines "popular government in the last

rity of the people is perhaps as satisfactory as any that has been given, but, as Lord Bryce himself admitted, it would, if applied to certain states or communities which in fact exclude from the suffrage the illiterate and non-property owning or non-taxpaying class, rule out states which certainly regard themselves as democratic. Would it not also eliminate states in which women are still unenfranchised? Formerly the exclusion of women from voting was not considered to be inconsistent with political democracy, but to-day when in many states women enjoy equal political privileges with men there is a large body of opinion in favor of the view that no state which denies them the right to vote, to sit in the legislature, and to hold office can justly claim to be considered as a true democracy. Where one of the legislative chambers of a state is elected by universal suffrage but the other is entirely non-elective or is chosen by a very restricted suffrage, may the government be properly regarded as democratic? Or if both chambers are democratically elected but the head of the state is a hereditary king, or if the constitution confers the right of suffrage on the mass of the people but the majority do not in fact exercise it, in consequence of their ignorance, or indifference, or are prevented by intimidation from exercising it, as is alleged to be the case in certain Latin-American republics, can it be said that the governments of such states are truly democratic?

### Kinds of Democracy ; the Pure Type.—Democracies, like

analysis and for all practical purposes" as being "that form of political organization in which public opinion has control." In the absence of public opinion there can be no popular government. As to what is public opinion, see Lowell, "Public Opinion and Popular Government," who maintains that in order that public opinion be the "proper motive force in a democracy" it must be really *public*; that to be such it must be more than the opinion of a majority; that it is not necessary that it should be the opinion of all, but the opinion must be such that while the minority may not share in it they feel bound to accept it; and that if "democracy is complete, the submission of the majority must be given ungrudgingly," pp. 14-15. Cecil Chesterton in his "The Great State" conceived democracy to be in its essence, whatever the means employed, a government which is in accord with the general will of the governed. To be such it need not be a government actually chosen and administered by the people. It might be a government of a despot, but if in accord with the general will it would be in essence a democracy.

Hasbach, a German writer, rejects the notion that democratic government is government by public opinion. See his article, "The Essence of Democracy," *Amer. Pol. Sci. Rev.*, vol. IX, p. 50, and the review by Shepard, *ibid.*, vol. VII, p. 700.

monarchies, are of several varieties. They are usually classified as (*a*) pure, or direct, and (*b*) representative, or indirect. A pure democracy, so called, is one in which the will of the state is formulated or expressed directly and immediately through the people in mass meeting or primary assembly, rather than through the medium of delegates or representatives chosen to act for them. Manifestly, a pure democracy is practicable only in small and relatively undeveloped communities where it is physically possible for the entire electorate to assemble in a given place and where the problems of government are few and simple. In large and complex societies, where the mass of citizens is too numerous to be convoked in a common assembly, and where the legislative and administrative needs of the community are numerous and complex, such a system of government is, for physical and other reasons, impossible. In the city states of ancient Greece and Rome, pure democracy was not impracticable and it was not uncommon, but in the highly complex and larger states of to-day it would, if attempted, break down in practice. The only surviving examples of pure democracies to-day are found in four of the smaller cantons of Switzerland (Appenzell, Uri, Unterwalden, and Glarus) where the voters, since the Middle Ages, have been accustomed to meet in assembly (*the Landsgemeinde*)—a sort of “open-air parliament”—for the purpose of electing their public officers, voting the taxes, and adopting legislative and administrative regulations.<sup>20</sup> Until 1848 the same system prevailed in the cantons of Zug and Schweiz, but with the growth of population and the increasing complexity of the problems of government and legislation it was abandoned and a representative system took its place. In time it will probably disappear for the same reason in the remaining cantons where it now survives. The local town governments in some of the American states, notably those of New England, are sometimes cited as other examples of pure democracies. Formerly they functioned satisfactorily enough, but in the course of time new and changed conditions came into existence which have made the system less satisfactory.<sup>21</sup>

In states or local communities where the referendum and initiative have been introduced on a large scale, a modified or limited form

<sup>20</sup> See Brooks, “Government and Politics of Switzerland” (1918), ch. 17.

<sup>21</sup> Compare Hart, “Actual Government as Applied under American Conditions” (1908), p. 171, and Fairlie, “Local Government in the United States.”

of pure democracy undoubtedly exists. In some such states to-day it is possible for the people to initiate and adopt laws and constitutional amendments and determine questions of public policy directly themselves without the intervention or collaboration of representatives. In such communities the representative system is tending more and more to acquire the form of pure democracy although it will of course never be entirely or even largely superseded by the latter system.

**Representative Democracy.**—The second type of democracy—representative government as it is usually styled—is that form in which the will of the state is formulated and expressed through the agency of a relatively small and select body of persons chosen by the people to act as their representatives. It is based on the idea that while the people cannot be actually present in person at the seat of government they are considered to be present by proxy.<sup>22</sup> Strictly speaking, a representative system of government need not necessarily be a democracy, if judged by modern standards, since the representatives may be chosen by a suffrage so restricted that it cannot be justly regarded as democratic; nevertheless, if democracy be interpreted in a broad sense, representative government is at the same time a form of democracy.<sup>23</sup> Like the pure type of democracy, it attributes the ultimate source of authority to the people, but it differs from pure democracy in that it is constituted on the principle that the people are incapable of exercising in a satisfactory manner that authority directly themselves. In short, it rests upon the distinction between the possession of sovereignty and the exercise of it.<sup>24</sup>

As to the origin of this now almost universal system of government, there has been much discussion and there is a wide difference of opinion. Some writers maintain that it had its beginnings in ancient times, notably in Switzerland, Germany, Holland, and even in Hungary; others, that the modern system was merely a revival of

<sup>22</sup> Ford, "Representative Government" (1924), p. 3.

<sup>23</sup> The Russian Soviet system is a good example of a government which claims to be based on the representative principle but which even according to the admission of its leaders is not democratic. All except actual workers and soldiers are excluded from voting. It is confessedly a dictatorship of the proletariat and rests on the communist principle that all other persons are exploiters and parasites.

<sup>24</sup> Compare W. F. Willoughby, "The Government of Modern States" (1919), p. 85.

the primitive Teutonic assembly of freemen.<sup>25</sup> But the late Professor Henry J. Ford in his work on "Representative Government" (1924) concluded, after a careful study of the subject, that it hardly dates back of the middle of the nineteenth century. Although it originated in England in the seventeenth century and gained a foothold in Belgium in 1830 when parliamentary institutions were established, the general movement for representative government began abruptly, he says, in the year 1848 in France and Italy.<sup>26</sup> Since then it has spread in one form or another until it has become, as stated above, very nearly universal.

**Essentials of Representative Government.**—Strictly speaking, a representative government is one whose officials and agents are chosen by an electorate democratically constituted, who during their tenure of power reflect the will of the electorate, and who are subject to an enforceable popular responsibility. According to this definition, a government by functionaries, whether legislative, executive, or judicial, who are appointed or selected by other processes than popular election, or who, if chosen by a democratically constituted electorate, do not in fact reflect the will of the majority of the electors or whose responsibility to the electorate is incapable of enforcement, is not truly representative. But judged by this rigorous test few, if any, existing governments could qualify as representative.

In many states the head of the executive branch of the government is not chosen by popular vote; in most of them the mass of executive and administrative officials, agents, and employes are selected by other methods than popular election; in the majority of them the judges of the courts are appointed by the executive or elected by the legislature. Popular usage considers a representative government to be one in

<sup>25</sup> Compare the following from Montesquieu ("Esprit des lois," 1748, bk. XI, ch. 6): "In perusing the admirable treatise of Tacitus, 'On the manners of the Germans,' we find it is from that nation the English have borrowed the idea of their political government. This beautiful system was invented first in the woods."

This theory of the origin of modern representative government was maintained and popularized by the English historian Freeman in his books, "The History of Federal Government" and "The Norman Conquest" (1860-1869), but it has found many critics. See Ford, *op. cit.*, chs. 4, 7.

<sup>26</sup> *Op. cit.*, pp. 4 ff. See also Esmein, "Droit const." (pp. 66 ff.), as to the origins of representative government.

which the legislative branch at least is popularly elected.<sup>27</sup> Thus in many of the most representative systems of Europe (British, for example) there are, aside from the members of the parliament and local councils, no popularly elected officials or agents at all. In all such countries the selection by executive or legislative appointment of the mass of administrative agents and judicial magistrates is not regarded as at all inconsistent with the principle of representative government. Even in the United States and Switzerland, two of the most democratic republics, the principle of representative government is not understood to require the popular election of judges and administrative officials. Nor does it require the selection of even the members of legislative bodies by an unrestricted suffrage. As has already been pointed out, women were generally excluded from a share in the choice of all officials, legislative and otherwise, until very recently, and even now they are still excluded in a good many states which claim to have representative governments. Similarly, in some countries which are recognized as classic examples of democracy, legislative representatives in one or both chambers are chosen by electorates from which large classes of adults are excluded. The truth is, as Lord Bryce remarked, all governments are in fact aristocracies, in the sense that they are carried on by a relatively small number of persons.<sup>28</sup> This must necessarily be so. Representative government in the sense of government by functionaries all of whom are chosen by an unrestricted electorate, aside possibly from small and undeveloped communities, would be almost as impossible as the system of pure democracy itself.

**Republican Government.**—The term "representative" government is often used as synonymous with "republican" government. Thus Madison in *The Federalist* defined a republican form of govern-

<sup>27</sup> "We mean by representative government," said Lord Brougham ("British Constitution," Works, vol. XI, p. 89), "one in which the body of the people, either in whole or in considerable proportion of the whole, elect their deputies to a chamber of their own." "A government is representative," said George Cornwall Lewis, "when a certain portion of the community, generally consisting either of all the males—or of a part of them, determined according to some qualification of property, residence, or other accident—have the right of voting at certain intervals of time for the election of particular members of the sovereign legislative body." "Use and Abuse of Political Terms," p. 107.

<sup>28</sup> "Modern Democracies," vol. II, p. 542.

ment as one in which there was "a scheme of representation."<sup>29</sup> It was, he said, "a government which derives all its powers, directly or indirectly, from the great body of the people and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."<sup>30</sup> The two "great points of difference," said Madison, "between a republic and a democracy (he was thinking of democracy in its "pure" form) are : first, the governing power in a republic is delegated to a small number of citizens elected by the rest ; and, second, a republic is capable of embracing a larger population and of extending over a wider area of territory than is a democracy. In a democracy the people meet and exercise the government in person ; in a republic they assemble and administer it by their representative agents."<sup>31</sup> Madison rightly regarded hereditary tenures as inconsistent with modern notions of republican government, although he considered good behavior tenure for the judiciary at least admissible. It is also essential to the republican idea that the principle of representation shall be based upon a reasonably wide suffrage. A suffrage so restricted, for example, as that which existed in France under the restored monarchy (1814-1848), when the number of voters did not exceed 300,000 out of a total population of about 30,000,000 or in Belgium before 1893, would hardly be considered consistent with republican government.

Republics have been classified as aristocratic and democratic ;<sup>32</sup> as monocratic and plutocratic ;<sup>33</sup> unlimited, mixed, and limited ;<sup>34</sup> as corporate, oligarchic, aristocratic, and democratic ; as federal and confederate ; and centralized and unitary ; as hereditary and elective, etc.

The term "republic" was formerly employed to describe certain forms of government which popular usage to-day would designate as monarchical or aristocratic.<sup>35</sup> Thus Sparta, Athens, Rome, Carthage, the United Netherlands, Venice, and Poland have all been described by

<sup>29</sup> No. 10.

<sup>30</sup> *Ibid.*, No. 39.

<sup>31</sup> *Ibid.*, No. 14.

<sup>32</sup> Lewis, "Use and Abuse of Political Terms," p. 69 ; Montesquieu, bk. II, chs. 1 and 2 ; also bk. III, ch. 3.

<sup>33</sup> Gareis, "Allgemeine Staatslehre," in Marquardsen's "Handbuch," vol. I, p. 39.

<sup>34</sup> Martens, "Précis du droit des gens," I, sec. 27.

<sup>35</sup> *The Federalist*, No. 39. Sir Henry Maine remarked that the term "republic" was once used to signify in a vague way a government of any sort which had no hereditary king, but now has come to have the added meaning of a government resting on a widely extended suffrage. "Popular Government," p. 198. Bluntschli observed in his "Politik" (pp. 295 ff.) that a republic may be understood in a

political writers as republics, though none of them possessed that full representative character which we to-day consider to be the distinguishing mark of a republic. Rome, for example, was organized on a military basis, Venice was an oligarchy of hereditary nobles, Poland was a mixture of aristocracy and monarchy. France under the constitution of the year XII (Tit. I, sec. 1) was styled a republic, though the chief of state bore the title and rank of emperor, and the crown was hereditary in the Napoleonic family.

**Other Classifications.**—Montesquieu classified governments as republics, monarchies, and despotisms. He defined a republican government as one in which the whole body or a part of the people exercises supreme power; a monarchy as one in which a single person governs by fixed and established laws; a despotism as one in which a single person directs everything by his own will and caprice.<sup>36</sup> The principle underlying this classification is partly numbers and partly the spirit and character of the government. Woolsey classified governments as monarchies, aristocracies, democracies, and "compound states."<sup>37</sup> Other writers recognize only two forms, namely, monarchies and republics, the latter comprehending both aristocracies and democracies.<sup>38</sup>

The fault with most classifications of governments is, as was said of the classifications of states, that they do not rest upon any consistent scientific principle which will serve as a basis for the differentiation of governments with respect to their fundamental characteristics. No single classification can be of much value; there must be as many classi-

wide and a narrow sense. In the wider sense we designate as republics all states in which the idea of the common good (*res publica*) prevails, that is, all states with public law (*jus publicum*). In this sense the natural-law writers of the seventeenth and eighteenth centuries spoke of all free states as republics. In this sense, also, says Bluntschli, a government is republican where no one holds public power as a property right, where all power is exercised for the common good, where the inhabitants are subjects and free citizens at the same time, etc. In a narrower sense a republic is used in opposition to a monarchy. In this sense it has reference to a government exercised through a collection of persons, and is either an aristocracy or a democracy.

<sup>36</sup> "Esprit des Lois," bk. II, chs. 1 and 2; also bk. III, ch. 3.

<sup>37</sup> "Political Science," vol. I, pp. 485 ff.

<sup>38</sup> For example, Jellinek, George Meyer, Schulze, Zacharia, and Alexander Hamilton classified governments as democratic, aristocratic, monarchial, and mixed. *The Federalist*, No. 9.

fications as there are points of view from which the government may be considered.

The classification of governments as monarchies, aristocracies, and democracies has little scientific or practical value. To describe a government as monarchial gives little idea as to its real character. Many governments described as monarchical are in fact democracies, and the distinction between aristocracies and democracies is often shadowy and largely a matter of definition. Such a classification would assign to the same category such widely different governments as those of Great Britain on the one hand, and the former governments of Russia, Turkey, Prussia, and Austria on the other, while it would put into different classes the democracies of Great Britain and the United States.

## CHAPTER XIV

### FORMS AND TYPES OF GOVERNMENT (*Continued*)

#### III. CABINET GOVERNMENT

**Professor Burgess's Classification.**—Burgess adopts the following canons of distinction in classifying governmental forms: first, the identity or non-identity of the state with its government; second, the nature of the official tenure, including the method of constituting the official relation; third, the relation of the legislature to the executive; and fourth, the concentration or distribution of governmental power.<sup>1</sup>

Upon the basis of the identity or non-identity of the state with the government, he classified them as primary or representative. The pure democracy, where the citizens assemble in mass meeting and enact the laws of the state and frame administrative regulations, is, of course, the nearest approach to what he called primary government. Where, on the other hand, the people have delegated to an organ or organs the power to act for it in matters of government, as is now the almost universal practice, we have representative government in some form, though not necessarily popular government.

Considered from the standpoint of the nature and source of the official tenure, he classified governments as hereditary and elective. Such a classification is manifestly of little value, since there are no governments and never have been any which were either entirely hereditary or entirely elective. There are and have been many governments in which the chief of state held office by hereditary succession, and others in which he and other functionaries were elective, but none in which the governing class as a whole was either hereditary or elective.

With respect to the relation of the executive to the legislature, governments may be classified as cabinet government (the terms "ministerial," "parliamentary," and "responsible" are sometimes

<sup>1</sup> "Political Science and Constitutional Law," vol. II, bk. III, ch. 1.

preferred),<sup>2</sup> and what, for lack of a more suitable term, has been called presidential or congressional government.

**Cabinet Government Defined.**—Cabinet government is that system in which the real executive—the cabinet or ministry—is immediately and legally responsible to the legislature or one branch of it (usually the more popular chamber) for its political policies and acts, and mediately or ultimately responsible to the electorate; while the titular or nominal executive—the chief of state—occupies a position of irresponsibility. The members of the ministry are usually members of the legislature and the leaders of the party in the majority, but whether they are members or not they usually have the privilege of occupying seats therein, of being heard, and of participating in the deliberations but without the right to vote unless they are members.<sup>3</sup> It is also the practice (sometimes it is so provided in the constitution) that they may be subjected to interpellation by the chamber of which they are members or in which they appear. In short, the ministerial office is not incompatible with legislative mandate. On the contrary, the cabinet system normally presupposes the double character of minister and member, and thus executive and legislative functions are "inextricably commingled." "There is," observes Courtenay Ilbert, "no such separation between the executive and legislative powers as that which forms the distinguishing mark of the American Constitution," but the relation is one of intimacy and interdependence. Bagehot described the British cabinet as "a hyphen that joins, a buckle that fastens, the execu-

<sup>2</sup> In England, India, and the Dominions, the term "responsible" government is most generally used; on the continent of Europe the term "parliamentary" government is preferred.

<sup>3</sup> Occasionally, but rarely, ministers in Great Britain are without seats in either house of parliament. Thus in 1908 the defeat of Mr. Churchill for re-election left him for a time without a seat in the House of Commons. In the Lloyd George ministry during the World War, 5 of the 88 ministers were not members of either house. In Great Britain, unlike the practice on the Continent, a cabinet minister cannot address a chamber of which he is not a member. Consequently a peer may address the House of Commons only through an under-secretary of state who is a member of the House, and *vice versa*. Until recently members of the House of Commons who were appointed ministers were required to submit to a new election. The rule had long been an object of criticism and during the World War its operation was suspended three different times. Finally, in 1919 an act of parliament was passed which relieves members from the necessity of submitting to a new election if they accept office within nine months following the issue of a proclamation summoning a new parliament.

utive and legislative together. In another place he spoke of it as a committee of parliament chosen to rule the nation.<sup>4</sup> It might be more accurately described as a committee of the party which has a majority in the House of Commons, ordinarily the minority party having no representation at all upon it. In this respect it differs from all other parliamentary committees. In its essence, says Lowell, it is "an informal but permanent caucus of the parliamentary chiefs of the party in power."<sup>5</sup> The nominal or titular executive, according to a legal fiction, is incapable of doing wrong, in a political sense, and is, as it were, under the guardianship of his ministers, who assume the responsibility for his official acts. Collectively they constitute the "government"; they prepare, initiate, and urge the adoption by the legislature of all the more important legislative projects; and from their seats in the legislature they defend their policies from attack, and when called upon must give an account of their official conduct. They are the heads of the great administrative departments and are, as stated above, usually the leaders of the majority party in the legislature. So long as their policies and official conduct command the support of the majority of the members of the legislature, or rather of that chamber to which they are responsible, they continue to hold the reins of office and govern the country. But as soon as the legislature clearly manifests its want of confidence in the ministry, through a vote of censure or by a refusal to pass the measures which it proposes or vote the sums of money which it asks, the ministry either resigns office in a body or it dissolves the chamber to which it owes responsibility, orders a new election, and appeals to the electorate to sustain it by returning a new legislature which is in sympathy with its policies and acts. If the results of the election are favorable to the ministry, it continues in office; if adverse, it resigns as soon as the results are fully known or when the new legislature has assembled and by positive vote has made known its want of sympathy.

<sup>4</sup> The late professor Dicey in an article entitled, "A Comparison between Cabinet Government and Presidential Government" (*Nineteenth Century*, vol. 85, Jan. 1919, pp. 25 ff.), emphasized, as did Bagehot, that the cabinet system is founded on a fusion of the executive and legislative powers and at the same time upon the maintenance of harmonious relations between them.

<sup>5</sup> "Government of England," vol. I, p. 56. Gladstone referred to the cabinet as "the threefold hinge that connects together for action, the King, the Lords, and the Commons."

**Cabinet Government in Great Britain.**<sup>6</sup>—In a typical cabinet system like that of Great Britain the ministry is usually taken wholly from the ranks of the party having a majority in the popular chamber, and thus possesses the character of homogeneity.<sup>7</sup> In legal theory the

<sup>6</sup> In theory the ministers in Great Britain are individually responsible for the conduct of their own departments and collectively responsible for the general policy of the government. Cases of individual resignations are not lacking, but with the growth of the parliamentary system collective responsibility has come more and more to displace individual responsibility. It is hardly necessary to say that cabinets do not feel obliged to resign in consequence of adverse votes on questions of minor importance. Thus Lloyd George did not resign in October, 1919, when he was defeated in the House of Commons by a vote of 185 to 113. The question was not one of great importance, the attendance in the House was small, and in a recent election the electorate had expressed its unmistakable confidence in the Lloyd George government. Lord Robert Cecil, recently commenting on the "absurd doctrine" that the fate of a ministry is involved in almost every division, suggested that the government should announce that in the future it would not regard, except on rare occasions, a parliamentary defeat as a demand for the resignation of the ministry.

<sup>7</sup> Soon after the outbreak of the World War this principle was departed from by the constitution of a "coalition" cabinet composed of representatives of both the two leading political parties and one member representing the Labor party. Mr. Lloyd George, who became prime minister in December, 1916, introduced further departures from the traditional system. He created a "war cabinet" of five members (it was a coalition cabinet), only one of whom held an important administrative office, who were to give their entire time to the general problems of the war. Executive power and responsibility were thus concentrated in this small body instead of in the unwieldy cabinet of 23 members. In short, an attempt was made to separate the functions, formerly combined in the cabinet, of executive control, both from the active leadership of parliament and from the immediate direction of administrative affairs. The prime minister ceased to be the active leader of the House of Commons and rarely attended its sessions. The establishment of the war cabinet did not affect the ministry although the status of the ministers was altered and the number increased to 88—nearly double that of pre-war ministries. The war cabinet lasted nearly three years and held 495 meetings. Unlike the regular cabinet it had a secretary and kept a record of its proceedings and summoned outsiders to its meetings. During the World War an "imperial cabinet" was also set up in England, which included the members of the war cabinet, the prime ministers of the self-governing dominions, and two representatives from India. At the final session of the Imperial Conference of 1916 it was announced that the prime minister proposed that meetings of the imperial cabinet should be held annually or oftener when matters of urgent imperial concern required. The creation of these two cabinets involved an important departure from the principle of collective responsibility to the House of Commons, since there was little connection between the war cabinet and the House and the members of the imperial cabinet could not be held responsible to it. Partly because of increasing criticism and partly because of Lloyd George's defeat in the House of Commons in 1919, he did away with

prime minister is chosen by the nominal or titular executive, and he selects his colleagues, though where the system of responsibility to the legislature is fully developed they are in reality chosen by the legislature and the designation by the chief of state of the prime minister is little more than a ceremonial function of investing him with the symbols of office. The number of ministers is rarely fixed either by law or by custom, and hence the size of the ministry is uncertain and variable, the exact number in any case being usually determined by the premier or by executive decree.

The cabinet system originated in England and was the product of history rather than of invention. From England it spread little by little to Holland, France, Belgium, Rumania, Sweden, Norway, Denmark, Greece, and, in limited forms, to China and Japan, and the recently created new states of Europe, until it has become, says Esmein, "the principal system of government in the world."<sup>8</sup> It made little headway in Germany, however, before the World War and none at all in Switzerland or the United States, and but little in Latin America.<sup>9</sup> The

the war cabinet and returned to the principle of collective responsibility. See Fairlie, "British War Administration," also his article, "British War Cabinets," *Mich. Law Review*, vol. XVI (1918), pp. 1 ff.; and Schuyler, "The British War Cabinet," *Pol. Sci. Quarterly*, Sept. 1918, and March, 1920.

The rise of the Labor party in England has tended to complicate somewhat the cabinet system. Under the two-party organization which formerly prevailed, the task of selecting the cabinet was relatively simple. It happened in 1923, however, that no one of the three parties had a majority in the House of Commons. The Conservatives had a larger number than either the Laborites or Liberals, but the two latter parties combined to overturn the Conservative ministry. In this situation the king appointed Mr. Ramsay MacDonald, leader of the Labor party, as prime minister, although his party did not have a majority in the House. With the support of the Liberal members, his ministry was able to govern for a year or more, but when that support was withdrawn it was obliged to resign, which it did, following a new election in 1924, when the Conservatives returned to power.

<sup>8</sup> "Droit constitutionnel," p. III.

<sup>9</sup> Except in Chile, where it has existed since 1891. The present constitution (promulgated Sept. 18, 1925) requires that all orders of the president of the republic shall be countersigned by a minister who shall be personally responsible (apparently to congress) for every act he signs and *in solidum* for those he may subscribe to or agree to with other ministers (Arts. 75-76). Ministers may attend the session of either house of congress and take part in the debates, but not vote (Art. 78). The history and working of the system prior to 1909 is described by Reinsch in an article entitled "Parliamentary Government in Chile," *Amer. Pol. Sci. Review*, Vol. III (1909), pp. 507 ff. During the last decade, he says, "parliamentary politics has been a succession of coalitions and alliances in which

cabinet system has received its fullest development in Great Britain, and there its workings have been attended with the most satisfactory results.

**Cabinet Government in the British Dominions.**—Not unnaturally the cabinet system of England was introduced in the British dominions, where it is "chiefly remarkable because of its close resemblance to the English model on which it is based."<sup>10</sup> It has not, however, worked with the same smoothness and facility as in the mother country from which it was imported. In some of the dominions, especially Australia, the system has been characterized by excessive instability.

every group and party has allied itself at various times with every other." Cabinets are constituted on the coalition principle, sometimes combining representatives of as many as six different political parties. The successful working of the system in its present form, we are told, is "well nigh impossible." "Nearly every one at the present time (1909) is a critic of the parliamentary system. The instability and confusion which the multiplicity of parties has introduced into Chilean political life is laid at the door of the system of cabinet government" (*ibid.*, p. 524). Excessive instability has resulted from the frequent changes of ministers, the average tenure of which (at least prior to 1909) has hardly exceeded four months. The cabinet system is sometimes said to exist in Haiti, the Dominican Republic, and other Latin-American republics, but if so, it is of a very imperfectly developed type. But apparently in all the Latin-American republics except Brazil and Venezuela cabinet members have the *entrée* to the legislature. In view of the fact that in Venezuela ministers may not occupy seats in the legislature, it may be questioned whether the cabinet system is really in force there, since the *entrée* of the ministers into the chambers is considered by some writers as an essential element in cabinet government. Sidney Low, for example, in his "Governance of England," goes to the extent of saying that "the root of the whole parliamentary form of government is that ministers must be members of parliament." On cabinet government in republics, see Carette, "Les républiques parlementaires" (1906). The question has been discussed as to whether the cabinet system is really compatible with the republican form of government. Redelob ("Le régime parlementaire," p. 263) expresses the opinion that one is more likely to find in monarchies an equilibrium between the executive and legislative powers, which is the indispensable condition of the parliamentary régime. Duguit appears to hold that the true cabinet system is not compatible with the republican régime if the president is anything more than a figurehead, for the reason that in such a case the equilibrium would be impossible. See his "L'état, les gouvernants et les agents," 1903, pp. 316 ff. In his more recent "Traité" (2d ed.), 1923, vol. II, pp. 658 ff., he is less categorical as to this.

<sup>10</sup> Keith, "Responsible Government in the Dominions" (1912), vol. I, p. 301. "The conventions of the English constitution," says Keith, "are followed in a manner which is almost embarrassing in its closeness of imitation, and the number of experiments which have been tried is very small, and they have been unimportant in actual result."

lity. In the latter country, "ministry after ministry comes into office and disappears in the course of a few weeks or months."<sup>11</sup> In Canada, however, the ministerial tenure has been longer and there has been consequently greater stability and continuity of policy. In most of the dominions "the inconsistent and stupid practice of requiring ministers after accepting office to vacate their seats," prevails as it did in England until very recently,<sup>12</sup> but in some of the Australian states the contrary practice has been adopted. In the dominions, as in Great Britain, there is no uniform practice as to whether a defeated minority shall resign when the results of a disastrous election are known or whether they may wait until they are formally condemned by the newly elected legislature. As in Great Britain, the general rule is that the ministers may be turned out only by the lower house even where the upper house is popularly elected.<sup>13</sup>

**The Cabinet System in Belgium.**—Among the cabinet systems of the Continent, that of Belgium most nearly resembles the British system, though the crown plays a more important rôle in that country than in England. The constitution expressly declares that no act of the king is valid unless it is countersigned by a minister who thereby assumes responsibility for it. The responsibility of ministers to the king is more real than in Great Britain, and he may direct and dismiss them with more freedom than the British sovereign may.<sup>14</sup> As there are generally recognized parliamentary leaders, the king rarely has any real choice, however, in the selection of his ministers.<sup>15</sup> In

<sup>11</sup> Keith, *op. cit.*, p. 322. In new South Wales there were 34 ministries between 1856 and 1912, in South Australia 41, in Victoria 33, and in Tasmania 27.

<sup>12</sup> *Ibid.*, p. 303.

<sup>13</sup> The system introduced in India by the act of parliament of 1919, resembles in some respects the cabinet system of Great Britain. The Viceroy's executive council is analogous to a ministry; they must be members of one or the other legislative chambers; the Viceroy generally, but not necessarily, acts upon its advice, but the Act of 1919 does not expressly declare that the members of the council shall be responsible to the Indian parliament.

<sup>14</sup> Dupriez, "Les ministres dans les pays principaux," vol. I, p. 215. Orban ("Le droit const. de la Belgique," vol. II, p. 272) remarks that the king cannot override his ministers but he aids them with his advice, moderates their orders, and orients their efforts by relating them to his opinions.

<sup>15</sup> Dupriez, *op. cit.*, vol. I, p. 212. But in late years the development of the three-party system under which no single party has had a majority in the chamber has had the effect of enlarging somewhat the discretionary power of the king in choosing the ministers. Members of the chamber who are appointed to

Belgium, as in Great Britain, ministers without portfolios are sometimes appointed as a means of introducing into the government eminent persons whose support and experience the government desires to avail itself of, yet who would hesitate to assume the burden of a cabinet portfolio. As in Great Britain, ministers are chosen not from the ranks of technical administrators, except in the case of the minister of war, who is always a soldier and usually an active general, but from the members of parliament and usually from the Chamber of Deputies rather than from the Senate.<sup>10</sup> All ministers, whether members or not, have the *entrée* into either chamber, where they have a right to be heard.

**The Cabinet System in France.**—The cabinet or parliamentary system of government was introduced in France by the Charter of 1814, but it was a rather imperfect copy of the English model. While the king was declared to be irresponsible and the ministers responsible to the lower chamber, the dominating rôle which the restored Bourbon monarchs actually played in the government of the country was incompatible with the normal functioning of the parliamentary system. With the advent of the July monarchy in 1830 and the shifting of the preponderance of power from the crown to the lower chamber of parliament, the control of the latter body over the ministers became more effective and thus one of the conditions of the true parliamentary system came to prevail. In the language of M. Thiers, the king now reigned but did not govern. But from the first the French system differed from that of England, where this form of government has operated with the greatest success. In the first place, the existence of

positions in the cabinet are not required to submit to a new election as was formerly the rule in England.

<sup>10</sup> But M. Theunis, who became prime minister in 1921, was not a member of either chamber. At the outbreak of the World War a coalition cabinet was constituted in Belgium as in other countries. It consisted of representatives of the Catholic party—the dominant party—and of the Liberal and Socialist parties. It was continued for a time after the war but in 1921 the Socialists refused to participate longer in the government and became the opposition party. More recently, however, coalition cabinets, predominantly Socialistic, have governed Belgium.

The Senate of Belgium has on various occasions asserted a claim to control the ministry but it has not succeeded in making good its claim. Nevertheless, the Senate may be dissolved equally with the Chamber of Deputies—an unusual feature of the cabinet system of government.

a multiple-party system under which no single political party usually had a majority in the Chamber of Deputies made it necessary that cabinets should be constituted on the coalition principle. Such cabinets are proverbially weak and consequently their tenure is usually very short, as compared with the tenure of British cabinets, the average being hardly more than eight months<sup>17</sup> and in recent years only three months. Naturally the choice of prime minister (the president of the council, as he is called) is often attended with great difficulty and long delays, and the selection by him of his colleagues is usually an even more difficult task.<sup>18</sup> Under such a system continuity of policy is necessarily difficult and frequently impossible.

Other conditions and features of the French system differentiate it from that of Great Britain. French temperament is not especially favorable to the smooth working of the cabinet system. In Great Britain there is a disposition on the part of parliament to allow itself to be guided and directed by the ministry, the parliament contenting itself with the ultimate right of control.<sup>19</sup> In France, on the contrary, the respective rôles of parliament and ministry are reversed : the ministry instead of leading and guiding the parliament is itself con-

<sup>17</sup> In 1873-1926 (a period of 53 years) France was governed by about 75 different ministries, whereas during that period Great Britain had only 12 prime ministers. Between November, 1917, and July, 1926, a period of less than nine years, France had 15 ministries, their tenures ranging from two days to two years and two months. Nine of them lasted less than four months and 5 of them less than one month. The Czar Alexander III is said to have once remarked to M. Hanotaux that "during the last 16 years the French minister of foreign affairs has been changed 15 times, so that one never knows whether one can rely on real continuity of French foreign policy" (Vizetelly, "Republican France," 1870-1912, p. 432). This forms a striking contrast to the history of the foreign office of Russia, where only three different men occupied the ministry of foreign affairs between 1813 and 1895, a period of 82 years. In 1925 three different men occupied in succession the ministry of finance in France.

<sup>18</sup> See some instances cited in my article "Cabinet Government in France," *Amer. Pol. Sci. Review*, vol. VIII (1914), pp. 36-7. As in other countries where the cabinet system exists, the rôle of the head of the state is limited to the selection of the prime minister, who is left free to choose his colleagues. This rule became established in 1877 when President MacMahon's request to be allowed to choose also the ministers of war and marine was successfully resisted by M. Dufaure, whom the president had asked to form a ministry.

<sup>19</sup> Compare Sidney Low, "The Governance of England," p. 81, and Baghot, "The English Constitution," ch. 6. "The principle of Parliament," said Baghot, "is obedience to leaders ; it chooses its leaders and then follows them ; what they propose, it supports."

trolled by the chambers even in respect to the details of administration and legislation and is frequently overthrown upon minor questions, notwithstanding the constitutional prescription that it shall be responsible only for its *general* policies. Through an excessive development of the practice of interpellations, ministers are harassed, compelled to give explanations in regard to relatively unimportant incidents, and are occasionally forced to resign on account of happenings which in England would not be regarded as meriting parliamentary discussion. This practice, which consumes a large part of the time of parliament and leads to the upsetting of ministries upon relatively unimportant questions, has been the object of much criticism by French writers, who charge that the existing French system is not the true parliamentary system but one which might more accurately be called *députantisme*.<sup>20</sup>

In France, ministers are usually members of one or the other

<sup>20</sup> See the authors cited in my article, "Cabinet Government in France," *Amer. Pol. Sci. Review*, vol. VIII (1914), pp. 353 ff. "Parliamentary government in France," says Professor Moreau ("Le pouvoir ministériel," *Rev. Pol. et Parlementaire*, vol. VII, p. 103), "is reversed, the head being on the ground and the feet in the air, the chambers governing instead of administering and directing the ministers instead of being guided by them." "The French parliament," says Professor Barthélemy, "is not content to be a collaborator with the executive power in the determination of general policies; it wishes to govern alone; and this is not all, it wishes to administer; it descends into the smallest details in the execution of the laws;—it ordains, it is the supreme dictator of the administration—we have reached the terminus of what Benjamin Constant called 'the horrible route of parliamentary omnipotence.'" "Le pouvoir exécutif dans les républiques modernes," p. 681. See also the criticism of M. Faguet in his "Problèmes politiques," ch. I. The French system of cabinet government is criticized by Redskob, an Alsatian scholar, in his "Le régime parlementaire" (1924). He emphasizes, as did Bagehot and Dicey, that the true cabinet system implies the existence of an equilibrium between the executive and legislative organs; that it rests with parliament to determine the general policy of the country and that subject to this control the ministry must be allowed to govern freely without the meddling of parliament (pp. 1 ff.). The French system is not a true system for the reason that it is not based on the theory of equilibrium. Only one of the two wheels in the machine operates, namely the parliament. The other is "demobilized." Consequently the French system is "truncated"; it is "deformed"; it is only a "reminiscence" of the parliamentary régime; "its soul is dead" (p. 257). M. Carré de Malberg (*op. cit.*, vol. II, pp. 95-96) adopts a different view. He thinks the preponderance of the legislative power is a natural feature of the cabinet system. Consequently the French type is the normal type whereas that of Great Britain represents a singular and abnormal type.

chamber, subject to the exception that occasionally the ministers of war and of marine are army or naval officers and not therefore members of parliament. Different from the British practice, ministers have the *entrée* to both chambers, where they may be heard and interpellated, even when they are not members of either. As in Belgium and since 1919 in Great Britain, members who are appointed to ministerial positions are not required to submit to a new election. Between 1868 and 1914 no ministers without portfolio appear to have been appointed, but during the World War the earlier practice was revived.<sup>21</sup> Under-secretaries of state who have charge of a portion of the administrative work of the department to which they are attached are frequently appointed, there being several such in the Viviani ministry of 1915. In 1906 the practice was introduced of inviting them to attend the meetings of the council of ministers. Strictly speaking, they are not responsible to parliament, but in practice they resign with the ministries to which they are attached.

There has been much discussion among the commentators on the French constitution as to whether the ministers are responsible to the Senate as well as to the Chamber of Deputies. On the one hand, it is argued on the basis of British and Belgian practice and upon French practice during the monarchy from 1814 to 1848, that the ministry is responsible only to the Chamber of Deputies. Moreover, since the Senate cannot be dissolved while the Chamber of Deputies may be, it would, it is pointed out, place the Senate in a position of mastery over the Chamber to allow it to overthrow a ministry.<sup>22</sup> On the other hand, the constitution declares in plain language that the ministry shall be responsible to the chambers, and not merely to one of them; the Senate has equal powers of legislation with the Chamber of Deputies; unlike the upper chambers in Great Britain and in the old French monarchy the French Senate is elected and it may interpellate the ministers and vote orders of confidence or censure equally with the Chamber of Deputies.<sup>23</sup> In

<sup>21</sup> At the outbreak of the war, M. Viviani took the premiership without portfolio and appointed an anti-militarist of the Socialist party as minister without portfolio. His successor, M. Briand, appointed five ministers without portfolio as members of his cabinet. The ministry as thus constituted contained 23 members, the largest ever known in France.

<sup>22</sup> So argued the late Professor Esmein, "Droit const." (5th ed.), p. 738.

<sup>23</sup> See the arguments of M. Duguit, "Droit const." (1911), vol. II, pp. 431 ff., and other writers cited in my article referred to above, p. 356, note 9.

practice ministries have on several occasions resigned in consequence of the hostile attitude or votes of the Senate,<sup>24</sup> and it now seems definitely established that the senate may compel a ministry to resign.<sup>25</sup> The responsibility of the ministry to both chambers and the necessity which the president is under of obtaining the consent of the Senate to dissolve the Chamber of Deputies undoubtedly increase the difficulties of cabinet government in France. In this connection it may be remarked that the practice of dissolution in France has fallen into desuetude. Exercised in 1877 by President MacMahon against a chamber which undoubtedly represented the overwhelming majority of the electorate (and exercised therefore in violation of the spirit if not the letter of the constitution), the French have come to regard it with a certain fear and as being inconsistent with the spirit of the republican régime. This represents a curious departure from the system of cabinet government in Great Britain, where dissolutions of the House of Commons and appeals to the electorate are not uncommon and where such a procedure is regarded as one of the most fundamental and essential features of responsible government.<sup>26</sup>

**Cabinet Government in Italy.**—In Italy the conditions under which cabinet government is conducted are similar in many respects to those prevailing in France. As in France, the chambers are usually divided into a number of political groups or factions, each of which must be given representation in the cabinet, and each must be placated whenever it shows signs of disaffection. Cabinets formed after long and laborious negotiations, says Dupriez, sometimes go to pieces over the first question which provokes debate.<sup>27</sup> The rôle of the chamber in determining the selection of the ministers is less than it is in either England or France. The king enjoys a much larger freedom and discretion in choosing his ministers, and the constitution says he may

<sup>24</sup> For example, the Bourgeois ministry in 1896, the Briand ministry in 1913, and the Herriot ministry in 1925.

<sup>25</sup> But M. Esmein says those instances show merely that the Senate has the power to compel the resignation of a ministry but not that it has a right to do so. It may be remarked in this connection that the Chamber of Deputies has often overthrown ministries which at the time had the undoubted confidence of the Senate.

<sup>26</sup> Dicey in his article cited (*Nineteenth Century*, January, 1919, p. 26), emphasized that the power of dissolution is the "leading characteristic" of the cabinet system in its normal form.      <sup>27</sup> "Les ministres," etc., vol. I, p. 287.

dismiss them. It also declares that they are responsible, but unlike the French constitution it does not say that they are responsible to the chambers or to one of them, and they have, we are told, "obsequiously surrendered their powers of control, so that the responsibility is now due mainly to the king."<sup>28</sup> The ministers are generally taken from the Chamber of Deputies, the premier practically always,<sup>29</sup> but they have the *entrée* to both houses and must be heard when they request it. The ministers of war and marine are usually army and navy officers respectively, and if not already senators, they are made such by royal appointment at the time they are chosen to the cabinet. Ministers without portfolio are sometimes appointed, and since 1888 each minister has had under his control an undersecretary, who may represent the minister in the chamber and defend the acts of the government.<sup>30</sup>

In consequence of the establishment of the dictatorship of Mussolini, the responsibility of the ministers to parliament virtually ceased to exist. For a time after the World War a succession of weak, timid, and short-lived cabinets followed which were powerless to deal with the extraordinary situation then existing in Italy, in consequence of which the cabinet system virtually broke down. By a law passed in 1923, it was provided that the political party which polled the largest vote for the Chamber of Deputies should have two thirds of the membership. This enables the *Fascisti* party to control the chamber even though it does not elect an actual majority of the membership. Still later a law was passed making the ministers responsible to the king rather than to the chamber, thus establishing fully Mussolini's independence of parliament. The chamber has in fact been reduced to the rôle of a mere consultative body.

**Cabinet Government in Germany.**—In Germany, the cabinet system was unknown before the close of the World War, although it found a place in the constitution proposed by the Frankfort

<sup>28</sup> This is the view of Dupriez (vol. I, p. 287)—a view which seems a little extreme. The king, it is quite true, exercises a more important rôle in the selection of ministers than in England, but there are limitations on his choice, and strong party leaders, like Giolitti and Sonino, have been practically forced upon him. In actual practice, moreover, the responsibility of the ministers is primarily to the legislature rather than to the king.

<sup>29</sup> Only once since 1848 has the premier been a senator.

<sup>30</sup> Dupriez, vol. I, p. 282.

parliament of 1848 and was constantly demanded by the Social Democratic party after the founding of the Empire in 1871. The imperial chancellor, the chief minister, and the other ministers who were associated with him not as his colleagues but as his subordinates and who were administrative functionaries taken from the ranks of the bureaucracy rather than from parliament, were responsible only to the emperor and could not be forced to resign by a hostile vote of the Reichstag. On several notable occasions the Reichstag by a large majority condemned the policy of the government and the Social Democrats demanded the resignation of the chancellor, but he usually replied that such a vote merely represented a difference of opinion between him and the Reichstag and could not be interpreted as a binding command to resign, that his responsibility was to the emperor alone and that he had no intention of resigning so long as he had the confidence of his Majesty.<sup>31</sup> In consequence, the Reichstag was not able to exercise any effective control over the government aside from its control over appropriations, and under the prevailing German doctrine of the budget this control was considerably limited.<sup>32</sup> It must be said, however, that apart from the Social Democrats the number of Germans who demanded a system of parliamentary responsibility was not large. Many German political writers and statesmen condemned the parliamentary system on the ground that it was a form of government by "fleeting majorities," that it was not in accordance with German notions of strong personal government, and because they did

<sup>31</sup> For example, in 1913 the Reichstag, by a vote of 213 to 97, condemned the government's policy of expropriation in Poland and also its policy in respect to the "Sabern Affair" by a vote of 293 to 54, on both of which occasions the Social Democrats demanded the resignation of the chancellor, but without result. It is true that in 1909 the chancellor Von Bülow resigned, partly in consequence of the hostile attitude of the Reichstag, but it was not until he had secured the legislation which he demanded and it was not because he was compelled to resign. He might have continued to defy the Reichstag as other chancellors did before and after him.

<sup>32</sup> According to this doctrine parliament could not refuse to appropriate the sums necessary for the maintenance of services already provided for by law, although it might repeal the law and thus put an end to the service. But so long as the law remained in force parliament was bound to provide the funds necessary for the continuation of the service which it had established and if it refused to do so the government itself might make the appropriations. See Shepard, "The German Doctrine of the Budget," *Amer. Pol. Sci. Review*, vol. IV, pp. 52 ff.

not desire to be put in the position of seeming to imitate the English and French.<sup>33</sup>

With the accession of the Social Democrats to power at the close of the World War, however, the establishment of parliamentary responsible government was assured.<sup>34</sup> Accordingly the new constitution (1919) provided not only that this system should be established for the *Reich*, but that each of the individual member states (*Länder*) should likewise be governed by a cabinet which must have the confidence of the representatives of the people (Art. 17). In short, having proscribed the system of personal government in the *Reich*, logic and consistency required that it should be equally proscribed in the states composing the *Reich*. The constitution expressly requires that the chancellor and the other ministers must possess the confidence of the Reichstag and must resign whenever that confidence is withdrawn by formal resolution. It requires all official acts of the president of the republic (who is declared to be politically irresponsible to parliament) to be countersigned either by the chancellor or some other minister who thereby assumes the responsibility to the Reichstag for his acts. The president is given the power to dissolve the Reichstag, but he is obliged to obtain the countersignature of a minister in order

<sup>33</sup> Compare Schinoller in "Modern Germany" (trans. by Whitelock, 1916), p. 213, and Treitschke, "Politics" (Eng. trans.), vol. II, p. 177. Treitschke condemned it because it involved the "very negation of monarchy itself" and because it was "a constitutional impossibility." Adverting to the "English pattern," he asked: "where and by whom is it laid down that Germany with her glorious history is bound to follow in the footsteps of an island state?"

As to the reasons why the system never gained a fast hold in Germany before the World War see an article by Professor Walter J. Shepard, entitled, "Tendencies toward Ministerial Responsibility in Germany," *Amer. Pol. Sci. Review*, vol. V, pp. 57 ff.

<sup>34</sup> In fact, a few weeks before the Armistice (Sept. 30, 1918), the emperor, yielding to the Socialist demand, addressed a letter to the departing chancellor in which he stated that it was his desire that "the German people should collaborate more effectively than in the past in the determination of the destiny of our Fatherland," and that "men invested with the confidence of the people should participate in a large measure in the rights and duties of the government." In consequence of his surrender, laws were passed on October 29, 1918, making the chancellor responsible to the Reichstag and the Bundesrat and providing that ministers might be selected from the Reichstag. Brunet, "The German Constitution" (Eng. trans. by Gollomb, 1922), pp. 8 ff. Since the close of the war the cabinet system has been the subject of numerous studies by German scholars. A bibliography of the literature may be found in Redslob, "Le régime parlementaire" (1924), pp. 278-279.

to do so, a requirement which may on occasion prove to be impossible. The German system is peculiar in that it distinguishes sharply between the rôle of the chancellor and that of the other ministers. The president appoints the chancellor and upon the proposal of the latter, he appoints and dismisses the other ministers. The chancellor is empowered to determine the general policy of the government, he countersigns the official acts of the president relating to matters of general policy, and he assumes responsibility for such policies. The other ministers are declared to be responsible to the Reichstag for the policies of their particular departments and they countersign the acts of the president which relate to the policies of their respective departments. Thus a distinction is attempted to be made between what the French call "governing" and "administering"; the chancellor is responsible for policies which fall within the former class: the other ministers for policies of the latter character. The result is that the principle of collective responsibility does not exist even in respect to questions of general policy.<sup>35</sup> This feature gives the German cabinet system a unique character and its practical working will be watched with much interest by students of political science. On account of the multiple-party system which exists in Germany, the task of constituting cabinets has not always been easy. In practice they are necessarily of the coalition type, the principal republican parties usually being represented by a number of members roughly in proportion to their strength in the Reichstag.<sup>36</sup> The establishment of the Hitler régime in 1933 virtually displaced the system introduced by the constitution of 1919.

**The Cabinet System in Other European States.**—The constitution of the new republic of Austria (1920) establishes a somewhat similar system of cabinet government. All official acts of the president of the republic are required to be countersigned by the chancellor or

<sup>35</sup> See as to this Redslob, *op. cit.*, p. 280, who, referring to the unique position of the chancellor in his relations with the other ministers, characterizes the German system as "mi-départemental, mi-hiéarchique." Adverting to the provision for the popular recall of the president, Redslob declares that it is incompatible with the traditional type of cabinet government, which supposes an irresponsible chief of state.

<sup>36</sup> Thus the first cabinet under the new constitution (14 members) was composed of 7 Social Democrats, 4 Democrats, and 3 representatives of the Center party, an agreement being reached among the three parties as to the number which each should have.

some other minister. The president is declared to be irresponsible to the legislature except for violation of the law, but the ministry as a whole or its individual members are declared to be responsible to the lower chamber and they are automatically removed from office by the adoption of a resolution of the chamber withdrawing its confidence.<sup>37</sup>

A feature which distinguishes the cabinet system of Austria from that of all other countries is found in the constitutional provision that the ministry shall be elected by the lower chamber instead of being appointed by the head of the state,<sup>38</sup> and that the ministers, although required to be eligible to seats in the lower chamber, are not required to be members. In Austria as in other parliamentary-governed countries the existence of the multiple-party system makes it necessary that cabinets shall be constituted on the coalition principle.

The cabinet system of Poland is modeled to some extent on that of France. Thus the lower chamber can be dissolved only with the consent of the senate, but with this difference, that the consent of three fifths of the senators is necessary instead of a majority of the senate as in France. In Yugoslavia the ministers are responsible to both the king and the parliament. The latter may be dissolved by the king only if the decree of dissolution is signed by all the ministers. In Czechoslovakia the president can dissolve parliament (both houses) only during the last six months of his term. The cabinet, however, is responsible only to the chamber of deputies. In Rumania the king has a larger control over the ministers than the head of the state usually has in parliamentary-governed countries. Recently he compelled the cabinet to resign and took a new ministry from the minority party.

#### IV. PRESIDENTIAL GOVERNMENT

**Features of Presidential Government.**—What has been called "presidential" government, [as contradistinguished from cabinet or parliamentary government] is that system in which the executive (including both the head of the state and his ministers) is constitutionally independent of the legislature in respect to the duration of

<sup>37</sup> Arts. 67-68.

<sup>38</sup> Art. 70. In a number of the individual German states, such as Prussia and Bavaria, which have no titular executives, the prime minister is elected by the lower house of the legislature, and in Baden, the entire cabinet is so elected.

his or their tenure and irresponsible to it for his or their political policies. In such a system the chief of state is not merely the titular executive but he is the real executive and actually exercises the powers which the constitution and laws confer upon him. He may and generally does act through the agency of ministers or "secretaries" (as they are called in the United States), but they do not thereby assume the responsibility to the legislature for his acts. In legal theory, their acts are his acts; they are chosen by him usually from the members of his own party,<sup>39</sup> but they are not taken from the legislature and in fact they may belong to a political party which does not have a majority in either chamber of the legislature. Indeed they cannot in the United States be members of the Congress, since the exercise of legislative mandate and the holding of ministerial office at the same time are constitutionally incompatible functions. They do not, therefore, unlike cabinets in countries where the parliamentary system prevails, prepare, introduce, and advocate, in the legislative chambers, the measures which they desire to have enacted into law, except in so far as they may do so through the agency of particular members of the legislature who may be in sympathy with such measures. They might be allowed the *entrée* to the legislature with the right to be heard and to be interpellated, but in practice they are usually not—never, in the United States. They are solely the ministers and servants of the chief executive who appoints them, and not of the legislature; they are politically responsible only to him and he may dismiss them for any reason which may seem to him to be sufficient without regard to whether they have the confidence of the legislature or not. He and they are generally responsible to the legislature or one chamber of it for certain grave crimes and may be impeached and removed from office, but they are not responsible to the legislature for their political policies or acts. Votes of censure, condemnation, or want of confidence by the legislature have therefore no legal effect and they never think of resigning in consequence of such votes or of the

<sup>39</sup> This is not a constitutional requirement and in the United States there have been departures from the general practice. Thus both presidents Roosevelt and Taft had in their cabinets one or two members who belonged to the opposition party. During the late war President Wilson was urged to follow the example of Great Britain, France, and other European countries and take into his cabinet some members from the opposition party, but he declined to adopt the suggestion.

refusal of the legislature to enact the measures or vote the appropriations which they advocate.

The ministers are, as stated above, politically responsible only to the chief executive who appoints them, and he (in case he is popularly elected) is responsible only to the electorate.

Since, under the presidential system, the chief executive and his cabinet may, and in the United States not infrequently do, belong to a political party which is in the minority in one or both chambers of the legislature, their responsibility to the legislature under such circumstances would manifestly lead to the breakdown of the presidential system.

**'The Presidential System in the United States.—**The presidential system finds its most conspicuous example in the United States, both in the national government and in those of the individual states, and in most of the Latin-American states which have followed the North American model. In a modified form it existed in the former German Empire (1871—1919), where, as stated above, the ministers were not taken from parliament but were the servants of the Emperor, where neither he nor they were responsible to parliament for their political acts or policies, and where the tenure of the latter was dependent entirely upon the pleasure of the emperor and not at all upon the will of parliament.

In the United States, the term of the President is fixed by the constitution at four years, he is elected by the people, and his powers are prescribed by the constitution; consequently he is independent of Congress in respect to his election, his powers, and the duration of his tenure. He may recommend for the consideration of Congress the enactment of particular laws which he favors or the appropriation of money for specified purposes ; he may veto bills passed by Congress, to which he objects, but neither he nor the members of his cabinet may themselves introduce bills or appear in Congress to advocate their adoption, nor may he dissolve either house of Congress and order a new election. He is absolutely free in choosing the members of his cabinet and is not obliged to select men who have the confidence of the majority party which controls either one or both houses of Congress. Nor is he limited, as is the chief executive in parliamentary-governed countries, to choosing a principal minister who selects his colleagues. He chooses

them all ; they are his subordinates, not his colleagues ; consequently his relation to them is very different from the relation of the prime minister in England, for example, to his associates. They are solely responsible to the President for their political acts and not to Congress, and they may be dismissed by the President for any reason which may seem to be sufficient or for no reason at all.<sup>40</sup> The system of the United States therefore on its executive side is in large measure constitutionally autocratic and uncontrollable by Congress.<sup>41</sup>

**The Presidential System in Latin America.**—In most of the Latin-American countries the presidential system, following the pattern of the United States, has been introduced.

In Argentina the constitution, however, requires that the acts of the president shall be countersigned by the ministers, who shall be individually responsible for the acts which they sign and jointly responsible for all acts agreed upon by each minister and his colleagues (Arts. 87-88). It also provides that the ministers may attend the sessions of congress and take part in the debates but shall have no vote (Art. 92). It will be noted that while the constitution proclaims the responsibility of the ministers, it does not indicate to whom they shall be responsible, whether to the congress or the president. The ministers are frequently interpellated in congress and in the session of January 29, 1894, an opposition member asserted that it belonged to congress at all times to require the ministers to attend and give explanations regarding their policies. Presidents and cabinets have sometimes resigned because of disagreements with the chamber of deputies, but opinion and general practice are in favor of the principle of the independence of the executive of parliamentary majorities, as in the United States.<sup>42</sup>

<sup>40</sup> The dismissal by President Wilson of Secretary of state Lansing affords a notable example.

<sup>41</sup> The system in the states of the Federal Union is somewhat different, since the principal state officers who collectively bear some resemblance to the President's cabinet are usually elected by the people and are not therefore subject to the control and direction of the governor. In short, the executive power is largely collegial in organization ; the principal state officers are the colleagues rather than the subordinates of the governor, and they are as independent in respect to their tenure and powers as he is, though like him they are not responsible to the legislature in the sense that they can be turned out of office by it.

<sup>42</sup> See the quotations from dispatches to the Paris *Temps*, in Esmein, "Droit constitutionnel," p. 423. See also James, "The Constitutional System of Brazil," p. 102, who, referring to the Argentine provisions, remarks that they were not intended to imply political responsibility to the congress.

The constitution of Brazil (July 24, 1891) is more exact and emphatic in respect to the relation between the president, his ministers, and the congress. It declares that the ministers may not appear in either chamber, that they may communicate with it only in writing or by conference with its committees, and that they shall not be responsible (except for crimes defined by law) either to the congress or the courts for the advice which they give the president.<sup>43</sup> It further fixes the term of the president at four years and declares that he can be removed only by the process of impeachment.<sup>44</sup> Only in one respect does the Brazilian system differ from that of the United States : the constitution requires that the acts of the president shall be countersigned by the ministers.<sup>45</sup> But as in the United States this was not intended to imply the political responsibility of the ministers to either or both chambers of congress. Their political responsibility is only to the president who appoints them.<sup>46</sup>

## V. THE SWISS SYSTEM

**Characteristics of the Swiss System.**—A system of government which falls in a class by itself, which differs fundamentally from the presidential and cabinet types, but which combines certain features of both, is that of Switzerland. It is a system in which the government is carried on by an executive council or board (seven members) chosen by the legislature for the same term as its own and usually from its own membership. It bears some resemblance to the cabinet system in that this council is, in a sense, a committee of the legislature chosen by it to exercise the executive functions of the government, that each member is head of an administrative department, that the members may occupy seats in both chambers of the legislature, that they may make motions, be heard (but may not vote) and be interpellated regarding their official acts and policies, and that they are largely subject to the control of the legislature (or rather the lower chamber) and will ordinarily yield to its demands when the legislature insists upon it. The council resembles a cabinet also in that it formulates and prepares drafts of all important legislative measures, including the

<sup>43</sup> Arts. 49-52.

<sup>44</sup> Arts. 43-53.

<sup>45</sup> Art. 132.

<sup>46</sup> James, "The Constitutional System of Brazil" (1923), p. 101.

budget, introduces them into the legislature, and advocates their enactment into law. Like the cabinet in England, in practice it plays the rôle of leader and guide, much more so than French ministries do.<sup>47</sup> It differs from the cabinet in parliamentary-governed countries, however, in that it does not necessarily represent the majority political party or a bloc of parties in either chamber, that consequently it is not necessarily a homogeneous body, politically speaking, that the members of the council are not at the time of their election committed to any political program, that interpellations are not followed by votes of approbation or censure, and, most important of all, that the members of the council are not responsible to the legislature in the sense that they are bound to resign when they lose its confidence or when the measures or policies which they advocate are altered or rejected. Moreover, they do not possess the power which ministries in most parliamentary-governed countries have, namely, the power to dissolve the legislature, or one chamber of it, and appeal to the electorate when they believe that they rather than the legislature represent the popular will.<sup>48</sup>

## VI. THE SOVIET SYSTEM OF RUSSIA

**Principal Features.**—A recently established form of government which is distinctly *sui generis*, not only from the point of view of the system of representation upon which it is based but also in respect to the relation between the executive and legislative powers, is that of the Russian Socialist Soviet Republic. Both the supreme legislative power and the constituent power are vested in the All-Russian Congress, representing the various soviets. When it is not in session, its powers are exercised by a central executive committee of more than 300 members chosen by the congress. Owing to the large and unwieldy size of the congress, the committee virtually exercises the legislative power

<sup>47</sup> An example of the confidence of the legislature in the executive council was afforded at the outbreak of the World War when the legislature by a resolution conferred "unlimited full power" upon the council to take all measures to maintain the security, integrity, and neutrality of Switzerland and to protect the public credit and economic interests of the country.

<sup>48</sup> Good brief accounts of the Swiss system may be found in Bryce, "Modern Democracies" (1921), vol. I, pp. 351 ff.; Munro, "The Governments of Europe" (1925), pp. 705 ff.; and Brooks, "Politics and Government of Switzerland" (1918), ch. 5.

of the congress and in practice it remains in session the year round even when the congress is sitting. It has thus become a sort of subordinate parliament which exercises its authority always subject to the supervision and ultimate control of the congress. The executive power, properly speaking, is entrusted to a council of people's commissars, each of whom is the head of an administrative department or commissariat. They are chosen by the executive committee and are responsible individually and collectively to it for their acts and policies. The council is therefore analogous to a ministry in parliamentary-governed countries. On the whole, the Russian system is more closely akin to the cabinet or parliamentary system than to the presidential system, although it differs from them both in so many particulars that, like the Swiss system, it properly belongs in a class by itself. Aside from the fact that it is not, and does not pretend to be, a democracy and that it rests mainly upon a system of *vocational* rather than *geographical* representation, its most distinctive feature lies in the non-existence of the principle of the separation of powers.

## VII. UNITARY AND FEDERAL GOVERNMENTS

**Unitary Government.**—Considered from the point of view of the concentration and distribution of power and the relation between the central and local authorities, governments may be classified as unitary (or centralized) and federal. Where the whole power of government is conferred by the constitution upon a single central organ or organs, from which the local governments derive whatever authority or autonomy they may possess, and indeed their very existence, we have a system of unitary government. It is characteristic of this form of government that there is no *constitutional* division or distribution of power between the central government of the state and the subordinate local governments. There is, in short, but one common source of authority and but one will exerted. For convenience of administration all unitary states are in fact subdivided into circumscriptions or districts (provinces, departments, counties, communes, etc.), each of which has a certain sphere of autonomy and restricted powers of local government, but generally those local areas are created and altered at will not by the constitution but by the central government, and whatever autonomy or power of local government they may possess is dele-

gated to them by the central government and may be enlarged or contracted at its will. They are, in short, merely parts of the central organization created by the latter to act as its agents for the purpose of local administration ; they are subject to its control and whatever autonomy or governmental competence may have been conceded to them exists by sufferance rather than by constitutional guarantee.

The governments of Great Britain and most of the countries of continental Europe and of Asia belong to this class. In Great Britain the counties and cities in fact possess a considerable sphere of local autonomy and of self-government, but it is derived from ordinary acts of parliament ; it may be enlarged or restricted at the will of parliament, and many of the activities of the local government are subject to the control of the central authorities.<sup>49</sup>

On the Continent, the government of France is the outstanding example of a unitary government. The country is divided into territorial circumscriptions called "departments" and these are subdivided into cantons, arrondissements, and communes, each having its own organs for certain purposes of local government, but the autonomy which they possess is very restricted ; it is derived not from the constitution but from acts of parliament ; the local organizations are in large measure mere agents of the central government, and the exercise of the powers of government left to them is subject to wide control by the central government even when those powers relate to matters of local administration.<sup>50</sup>

In the other countries of continental Europe (except those in which the federal system has been established : Germany, Austria, and Switzerland) the situation in this respect differs only in degree from that of France.

**Federal Government Explained.**—Federal government, as contradistinguished from unitary government, is a system in which the totality of governmental power is divided and distributed by the national constitution or the organic act of parliament creating it, between a central government and the governments of the individual states

<sup>49</sup> As to this control, see Ashley, "Local and Central Government" (1906), ch. 1, and Lowell, "The Government of England" (1908), vol. II, pt. III.

<sup>50</sup> As to the position of the local governments in France and the control which the central government exercises over them, see my article "Administrative Reform in France," *Amer. Pol. Sci. Review*, vol. XIII (1919), pp. 17 ff., and the sources there cited. Also, Gooch, "Regionalism in France" (1931), ch. 2.

or other territorial subdivisions of which the federation is composed. These latter governments are not the creations of the central government of the union ; in most federal systems the reverse is the case, that is, the central government has been created by the constituent members through the act of federation ; they are something more than parts or agents of the central organization ; their sphere of autonomy is determined not by the central government but by the general constitution of the federation or, as in the British dominions, by an act of the imperial parliament which serves the purpose of a constitution. Consequently, they do not exist by the sufferance of the central government nor may their competence be restricted by it.

Federal government may, therefore, be defined as a system of central and local government combined under a common sovereignty, both the central and local organizations being supreme within definite spheres, marked out for them by the general constitution or by the act of parliament which creates the system. It is dual government as contradistinguished from unitary government, and implies local self-government as opposed to centralized government. It represents a sort of compromise between unitary government and confederate government. The territorial areas of these local organizations are not therefore mere administrative districts, but autonomous and, in a certain sense, self-created political communities, having their own constitutions and political systems. The central and local governments are not, however, totally separate and disconnected from each other in organization. Federal government is not, as is often loosely said, the central government alone, but it is a system composed of the central and local governments combined. The local governments are as much a part of the federal system as the central government is, although they are not the creations of or subject to the control of the central government.

**Distribution of Powers in the Federal System.**—The principle upon which the powers of government are distributed between the central and local governments in a federal system is that those affairs which are of common interest to the federation as a whole and which require uniformity of regulation should be placed under the control of the central government, while all matters not of common concern should be left to the care of the local governments.<sup>51</sup> In short, there

<sup>51</sup> Compare Dicey, "Law of the Constitution," p. 131 ; and Freeman, "History of Federal Government," pp. 34.

should be one government for national affairs and a number of local governments for local affairs. In respect to the former, therefore, federal government resembles unitary government, while in respect to the latter it is more like confederate government. Opinions differ, however, as to what affairs require uniformity of regulation and what should be left to local regulation, and hence the line of demarcation between general and local matters is in practice drawn differently in different federal systems. In most states having the federal form of government, however, such affairs as foreign relations and international intercourse, war and peace, interstate and foreign commerce, coinage of money, patents and copyrights, have been placed under the control of the central government. In international relations the component members of the federal union are largely non-entities, but they have shown themselves able in certain instances to interpose obstacles in the way of the successful prosecution of a common foreign policy by the central government.<sup>52</sup> In the more recently established federal systems of Europe the notion of what requires uniformity of regulation and what will permit of diversity of control is somewhat different from that which has prevailed in the United States, and consequently the principle of distribution has been different. In these states many affairs are treated as being of general interest and hence requiring uniformity of regulation, which in the United States are left to local regulation. Thus, in Germany the whole body of civil, criminal, and commercial law and the law of procedure, as well as the law of marriage and divorce, is national, not local; that is, instead of widely varying legal systems in these domains, there is a single uniform code for all the component parts of the federation.<sup>53</sup> The evils that

<sup>52</sup> In Germany and Switzerland the component members of the federation (*Länder* and cantons) have a limited power to make treaties with their adjacent foreign neighbors.

<sup>53</sup> In the new German federation (constitution of August 11, 1919) other matters such as citizenship, internal migration, emigration, immigration, etc., are declared to be within the *exclusive jurisdiction* of the *Reich* and the states (*Länder*) may not therefore legislate upon these matters. Over various other matters which in the United States fall within the jurisdiction of the individual states, such as the civil and criminal law, poor relief, vagrancy, the press, associations, public meetings, public health, labor, banking, insurance, the regulation of theaters and cinematographs, etc., the *Reich* is given the right of legislation subject to the provision that in case this right is not exercised by the central legislature, they may be regulated by state legislation (Art. 7 of the constitution). Regarding other matters still, which in the United States are left to state legislation, such

have arisen in the United States in consequence of the extraordinary variety of legislation, especially in respect to certain matters that are really national in scope rather than local, have recently aroused discussion in many quarters in favor of increasing the powers of the national government along various lines.

**Method of Distribution.**—Two methods have been followed in distributing the powers of government between the central and local organizations, where the federal system prevails. In most such states the powers intrusted to the central government are specifically enumerated by the constitution or organic act of the federation. To the local governments are reserved all the remaining powers except such as may be specifically prohibited to them. The central government is thus an authority of delegated powers, while the local governments are authorities of residuary powers. In other words, the competence of the central government is *positively* determined by the constitution, while that of the local governments is *negatively* determined. The presumption of law in case of doubt, therefore, is against the existence of any power claimed by the central government and in favor of any power claimed by the local governments. In the federal system of

as the protection of the public order and safety, education, religion, ownership and use of land, disposal of the dead, etc., the *Reich* may, if uniformity seems desirable, legislate upon these or lay down fundamental principles which shall be observed by the states (*Länder*) in legislating upon them (Arts. 9-11). Moreover, the whole German federal system as described above was virtually abolished in 1933 under the Hitler dictatorship, and was replaced by a unitary system. In the new federal republic of Austria the federal legislature is given power to legislate in respect to practically the same matters, including also the power to lay down general principles to be observed by the state legislatures in legislating upon certain subjects. Likewise in Switzerland the legislature of the Confederation reserves the power of legislation in respect to such matters as the civil and criminal law, commercial obligations, child labor, insurance, issue of banknotes, marriage, traffic in food and in commodities which are dangerous to health, sanitary police, etc. In Canada the Dominion parliament has the power to legislate upon such matters as trade and commerce, quarantine, banking, bills of exchange, promissory notes, marriage and divorce, the criminal law, and other matters which in the United States are left wholly or in part to the states. In Brazil, where the distribution of powers between the central and state governments is in general similar to that of the United States, the federal congress is given power to legislate in regard to the civil, criminal, and commercial law (Art. 34, sec. 23). This departure from the constitution of the United States was due to the fact that at the time of the establishment of the federal republic of Brazil there was already in force uniform national law upon these subjects. Compare James, *op. cit.*, p. 26.

Canada, however, a different principle of distribution, prevails. There the local governments are authorities of enumerated powers, while the central government is one of both delegated and reserved powers.<sup>54</sup> Whatever may be the method or principle of distribution, or the nature and extent of power delegated or reserved to either government, neither may enlarge its competence or redistribute the powers of government differently from the way in which they already have been distributed by the constitution or organic act of the union. Only the sovereign itself can do that.

**Federal Control and Coercion.**—In some federal systems, however, the central government is given a limited control over the organization and acts of the local governments. Thus, in the United States it is made the duty of the national government to see that only republican governments shall be maintained by the individual states, from which it may be inferred that the national government may prohibit such local organizations as do not in its judgment conform to this requirement. Similarly the German constitution of 1919 (Art. 17) requires that every state (*Land*) shall have a republican form of government—one in which the representatives are elected by universal, equal, direct, and secret suffrage of both men and women, according to the principles of proportional representation, and also that it shall have the cabinet system. The same provision is found in the Austrian constitution of 1920 (Art. 95). In Canada, the Dominion government has the power to disallow the acts of the provincial legislatures; likewise in the federal republic of Venezuela the national government may veto the acts of the local legislatures. In Germany the central government may by the process of federal execution compel, by armed force if necessary, a delinquent or recalcitrant member of the *Reich* to perform the duties imposed upon it by the constitution (Art. 48).<sup>55</sup>

<sup>54</sup> British North America Act secs. 91-92; Munro, "Government of Canada," especially chs. 22 and 23. Article 91 of the act enumerates twenty-nine classes of subjects upon which the Dominion parliament may legislate, but it may also legislate on other subjects which are not conferred exclusively upon the provincial legislatures. Article 92 enumerates fifteen subjects upon which the latter have the exclusive right of legislation and it adds: "generally, all matters of a merely local or private nature in the province."

<sup>55</sup> Compare also Article 27 of the Swiss constitution, which charges the Confederation with "taking the necessary measures" against such cantons as do not fulfill certain duties relative to the maintenance of primary public schools and the admission thereto of the children of all religious confessions.

The right of federal coercion against the states for the non-performance of their constitutional obligations distinguishes the German federal system from that of the United States. In the latter country it is generally admitted that the national government has no such power and in practice it has never been attempted. This does not mean, however, that the national government cannot employ force to protect the public property of the United States, to execute the provisions of the federal constitution, laws, and treaties, and to enforce the processes and decrees of the federal courts. The Supreme Court has said that the United States has the constitutional power to "brush away every obstacle" to the enforcement of its authority on every foot of the national territory.

In case the authorities of a particular state interfere with or attempt to prevent such action, the force employed will necessarily be directed against them, but this is not the same thing as federal coercion or federal execution in the sense in which it is authorized by the German constitution. It was in pursuance of this right that President Lincoln justified his course in sending the armed forces into the southern states in 1861.

**Local Execution of Federal Laws.**—In one other respect the federal system of the United States, Brazil, and most other countries which have it, differs from that of Germany, Austria, and Switzerland. In the first-mentioned group of countries the national government possesses its own officials and governmental machinery for enforcing its laws, collecting its revenues, and performing the other services with which it is charged. The constitution of Brazil (Art. 7, sec. 3), expressly declares that the laws of the Union and the acts and judgments of its authorities shall be put into execution throughout the country by federal officials. Nevertheless, it provides that the execution of federal laws may be intrusted to the governments of the states, with their consent. This devolution of authority may also occur in the United States, provided the state authorities so consent, but in practice it is rarely done.<sup>56</sup> In Germany, Austria, and Switzerland, on

<sup>56</sup> An exception is found in the practice of permitting state and local courts to issue certificates of naturalization to aliens in pursuance of federal legislation governing the naturalization of foreigners. The reliance, in part, of the national government upon the states for their assistance in the execution of the federal liquor prohibition law may also be cited as another exception.

the contrary, it is the practice to rely, in large measure, upon the governments of the states (*Länder*) or cantons to carry into execution the laws enacted by the national legislature. In Germany the constitution (Art. 14) declares that the laws of the *Reich* shall be executed by the state authorities, unless otherwise provided by law. Except for such matters as are committed exclusively to the jurisdiction of the *Reich* (foreign affairs, national defense, coinage, customs, postal administration, and a few other matters), the *Reich* does not depend upon its own officials and agents but relies upon those of the states. The constitution of Austria (Arts. 10-11) likewise provides that while federal legislation in respect to certain specified matters shall be executed by the federal authorities, the execution of federal laws relating to various other matters shall be intrusted to the state authorities. In Switzerland likewise a considerable part of the legislation enacted by the federal parliament is left to the cantonal governments to be executed, and certain federal taxes (e.g., the military exemption tax) are collected by the cantonal authorities.<sup>57</sup>

Each system has its advantages and disadvantages. Reliance upon the state or local authorities avoids the duplication of administrative machinery, but it possesses the disadvantage which results from throwing upon the local governments responsibility for the execution of national laws and the defense of national policies to which they, supported as they often are by local public sentiment, may be opposed or as to the enforcement of which they may be indifferent. In order to insure that such legislation will be properly executed by the local governments, the federal systems of Germany, Austria, and Switzerland provide for federal supervision, inspection, and as stated above, for federal coercion of the local governments, when they are charged with the execution of federal legislation. Thus, in Germany, the federal ministry is empowered to issue instructions to the state authorities as to how the federal laws shall be carried out and it may dispatch commissioners to the state governments to supervise the execution of those laws (Art. 15). The constitution of Austria (Art. 15) likewise provides for federal supervision of the execution of national laws. Similarly, in Switzerland, the government of the confederation exercises supervision over the cantonal administration of various federal laws.<sup>58</sup>

<sup>57</sup> See as to this Brooks, "Government and Politics of Switzerland," p. 59.

<sup>58</sup> Brooks, *op. cit.*, p. 59, and Bryce, "Modern Democracies," vol. I, p. 342.

**Federal Intervention in Local Affairs.**—In most countries where the federal system is found the national government has a certain right of intervention in local affairs, especially for the preservation of internal order. In the United States the national government may intervene, by the use of armed force, if necessary, to suppress domestic violence in any state, provided application has been made for such aid by the legislature, if it be in session, or by the governor if it is not in session. If the disturbance interferes with the operations of the national government, the processes of the federal courts, or with the movement of interstate commerce the President is not bound to wait for an application from the governor or the state legislature but may upon his own initiative send federal troops to the scene of the disturbance and prevent such interference, as President Cleveland did in the case of the Chicago strike in 1894.<sup>59</sup>

In Brazil the federal government is empowered to intervene in the affairs of the states to repel invasion, to maintain the republican form of government therein, to reestablish order and tranquillity (upon request of the state governments), and to insure the execution of federal laws and the judgments of the federal courts.<sup>60</sup> The constitution of the United States goes further and makes it the *duty* of the United States to intervene to protect the states against invasion, and to maintain the republican form of government. The constitution of the Swiss confederation (Art. 3) makes it the duty of the federal government to guarantee the integrity and "sovereignty" of the cantons, in so far as they are recognized to be sovereign. Its right to intervene in the case of internal disturbances is affirmed by the constitution, and it is not necessary to wait for an appeal from the cantonal authorities (Arts. 14-16). There have been eleven cases of federal intervention

The practice in the United States of granting subventions from the national treasury to the states, e.g., in aid of education, the construction of highways, and the training of the militia, upon condition that the states accepting such grants shall fulfill certain requirements laid down by federal law in respect to the character and standards of the service undertaken, has tended to bring under federal control an increasing domain of state activity. In Switzerland federal subventions to the cantons in aid of education and the construction of public works are also frequently made and with the same result.

<sup>59</sup> See Cleveland, "Problems of Executive Power," and Woodburn, "The American Republic," pp. 172 ff.      <sup>60</sup> Constitution, Art. 6; and James, *op. cit.* p. 16.

in the cantons since 1848, five of them being in the canton of Ticino.<sup>61</sup>

In Germany the constitution (Art. 48) provides that if the public safety and order are materially disturbed or endangered the president of the republic may "take the necessary measures" to restore it, and if necessary he may intervene by force of arms. To this end he may temporarily suspend, wholly or in part, the liberties of the people as guaranteed by various articles of the constitution and proclaim the existence of martial law.

### VIII. OTHER FORMS OF GOVERNMENT

**Confederate Government.**—Confederate government may be defined as a system in which each member state of a confederation retains its own sovereignty and has such form of government as it chooses, there being a common central organization only, or mainly, for their mutual support and defense.<sup>62</sup> Whereas federal government is a dual system under a common sovereignty, in a confederacy (the term "confederation" is sometimes preferred) there are as many sovereignties as there are states forming the confederation. There is no such division of power between the confederation and the component member states as exists in a federal union. There may be a central government, but if so it is usually created by treaty or articles of agreement among the confederated states rather than by a constitution and it is merely the agent of the member states for the performance of a few services in their name. It usually lacks executive and judicial machinery and in the place of a lawmaking organ it has a congress or diet composed of delegates whose functions more nearly resemble those of diplomatic plenipotentiaries than legislators with lawmaking mandates. This congress may pass resolutions but ordinarily it has no real power of binding legislation. Such resolutions are addressed not to the individuals who make up the population but rather to the confederated states themselves, and reach the individuals for whom they are intended only mediately and indirectly, through the medium of the state organizations. A

<sup>61</sup> As to the facts, see Brooks, *op. cit.*, pp. 55 ff.

<sup>62</sup> Compare Burgess, "Political Science and Constitutional Law," vol. II, p. 6.

confederacy in reality has no citizens or subjects who owe it direct and immediate allegiance. Its competence generally includes only such matters as relate to foreign relations, defensive war, and possibly a few matters of an interstate character. Usually it possesses no power over the sources of its own revenue, but is dependent upon the voluntary contributions of the confederated states. Finally, it lacks stability and permanence, and its existence is precarious, since it belongs to the component members to withdraw from the confederation at will or refuse to be bound by its acts and resolutions. It is a transitory form of political organization which usually develops into the federal system or dissolves into its constituent elements.

**Bureaucratic Government.**—Some governments viewed from the standpoint of their spirit, their methods, and the professional character of their administrative personnel, have been described as "bureaucracies." Strictly speaking, a bureaucratic government is one which is carried on largely by ministerial bureaus and in which important policies are determined and decisions rendered by the administrative chiefs of such bureaus. In a wider sense, it means any government the administrative functionaries of which are professionally trained for the public service, and who generally enjoy permanency of tenure, promotion within the service being partly by seniority and partly by merit. In such a system the government service is a profession and offers a career to those who enter it. Usually there are developed among such a body of functionaries an *esprit de corps* and a spirit of discipline somewhat similar to those found in a regular army. Naturally also they tend to develop a spirit of caste and to become a class separate and apart from the non-official part of the population. Government as carried on by such a class is apt to be characterized by an excessive formalism and tends to overemphasize administrative routine rather than fundamental principles—in short, it tends, as Burke remarked, to think more of form than of substance. The most extreme example of a bureaucracy which the world has seen in modern times, perhaps, was that which existed in Prussia from 1720 to 1808. A bureaucracy of a less absolute character was that which existed in France under Napoleon for a time after 1808. In varying degrees of development this form of government exists to-day in most of the states of Europe, especially in Germany and Austria, and to a

less degree in England and France. Commonly thought of only in connection with monarchical states, its forms and methods, and to some extent its spirit, are nevertheless found in the governmental systems of many republican states as well.<sup>63</sup>

In France to-day one hears much complaint of what are in reality the methods of a bureaucracy. There the government of the country is, as stated above, extremely centralized, mainly in Paris, but also in the capitals of the departments. Inevitably there is an enormous congestion of administrative work in both the ministries and the prefectures. Thousands of questions pour in from all points of the Republic for decision or solution, involving matters which in the United States would be settled by the local authorities who alone are really interested or affected. In the departments the communal budgets must be approved by the prefect. In some of the larger ones as many as 500 such budgets may be laid before him for his approval. Under such circumstances the decision in these and many other matters which require his approval, must in fact rest with administrative subordinates in the prefecture. The decision by the subordinate at the bottom of the hierarchy must be examined and passed upon by a succession of superiors up to the minister or the prefect. Naturally the machinery moves at a speed the slowness of which tries the patience of everybody concerned, and not infrequently years pass before the most trifling matters are finally disposed of. Reports, counter-reports, memoirs, recommendations, decisions follow one another in bewildering profusion until the papers and documents relating to a particular matter attain the height of a small mountain.<sup>64</sup>

<sup>63</sup> On bureaucratic government, see Brater and Bluntschli, "Deutsches Staatswörterbuch," vol. II, pp. 293-297 (art. "Bureaucratie"); Goodnow, "Comparative Administrative Law," vol. II, pp. 8-9; Mill, "Representative Government," pp. 109-110; Block, "Dictionnaire de la politique," vol. I, pp. 271-275; and Bachem, "Staatslexikon," vol. I, pp. 1070-1078. See also Bryce, "Modern Democracies," vol. I, pp. 274-275.

<sup>64</sup> The French word "paperasserie" has been coined to describe this method of administration which requires an extensive multiplication of papers. M. Chardon, a member of the Council of State, describes in several of his books ("Les travaux publics," 1904, and "Le pouvoir administratif," 1911) the slow, tortuous, and prolonged courses which the French administrative machinery takes. Among others he mentions the processes which are required for the replacement of a worn-out bridge on a national highway. It involves a succession of inspections and reports by both ordinary and chief engineers, approval of the council-general

Nevertheless, bureaucratic government in the wider sense referred to is not without its merits. It is government by persons who have been especially trained for the work in which they are engaged. They possess the skill and capacity which are acquired from permanency of tenure and experience. It is consequently likely to be more efficient than the service of functionaries without training, who are appointed without regard to their ability to perform the work with which they are charged, and who soon retire and make room for others who are equally untrained. "It accumulates experience," says Mill, "acquires well-tried and well-considered traditional maxims, and makes provision for appropriate practical knowledge in those who have the actual conduct of affairs."<sup>65</sup>

**Popular Government.**—Contradistinguished from bureaucratic government is what is sometimes vaguely called popular government, that is, government by persons who are drawn at regular intervals from the ranks of the people, many of them by popular election, and who after a brief tenure return to private life. Generally they are without special training; not infrequently they serve without

of roads and bridges, several journeys back and forth between the departmental capital and Paris, examination by the prefectoral authorities, publication of notice in the commune where the bridge is situated, hearing by a commission of engineers, examination by a section of the council of state, a decree of the president of the republic, and publication in the *Journal Officiel*. If, he says, there are no extraordinary difficulties in the way these various stages of procedure may be traversed within a period of fifteen or eighteen months, but if the bridge happens to be in the neighborhood of a large city there will be a controversy as to whether the city shall bear a portion of the cost, in which case the accomplishment of the task will be further delayed ("Les travaux publics," pp. 126-129). M. Chardon refers to the simple task of determining the property line of a land owner on a roadside as one which will involve nineteen different transactions, reports, memoirs, decrees, etc., and at least six weeks of time (*op. cit.*, pp. 130-132). A deputy in the course of a discussion of the budget of public works some years ago stated that he knew of instances in which as many as fifty administrative formalities were required to complete a relatively simple transaction.

<sup>65</sup> "Representative Government" (Universal Library Edition), p. 109. But Mill considered that the defects outweighed the advantages. "The disease," he said, "which afflicts bureaucratic governments and of which they die, is routine. They perish by the mutability of their maxims and still more by the universal law that whatever becomes a routine loses its vital principle." It tends, he added, to become a "pedantocracy" (*ibid.*, p. 110). Röhmer characterized bureaucracy as the only government for which philosophers could find no defense. Art. "Bureaucratie" in Brockhaus, "Konversations-Lexikon."

pecuniary compensation; and often they are during the term of their public service engaged in other occupations. Under such a system most of the offices are open to all without preliminary preparation or examination, few or no professional qualifications are required, and the official class never develops a caste system or loses touch with the people. It is more or less influenced by public opinion, and in the discharge of its duties is more often subject to legislative than administrative control.

**Individualistic and Paternalistic Government.**—Finally, from the point of view of their functions and sphere of activity, governments may be denominated as *individualistic* and *paternal*. A government of the former type is one whose activities are limited mainly to the simple police functions of maintaining the peace, order, and security of society, internal and external, and the protection of private rights. A paternal government is one whose functions are not limited merely to restraining wrongdoing and to protecting private rights, but which goes farther and undertakes to promote by various means the social well-being of the people. It undertakes to perform for society many services which might be performed as easily through private initiative, on the ground that they can be more efficiently and economically done by the government than by private individuals. Such a government may own and operate various industries, engage in business enterprises, provide pensions for the old, the sick, and the infirm, and in other various ways care for the social interests of the people.

## IX. SUCCESSION OF GOVERNMENTAL FORMS

**Theories of Early Writers.**—No state has retained the same form of government throughout its whole history. Governments are constantly changing their forms so as to adapt themselves to the altered conditions of a new environment. Thus, Athens was first ruled by kings, then by an aristocracy, later by tyrants, then by a democracy, and finally again by kings. So Rome went through a cycle of political transformations. It began as a city kingdom, then it became a republic, and finally an empire ruled by Caesar. The government of France within less than a century passed through the forms of an

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absolute monarchy, a republic, an empire, a kingdom, again a republic, again an empire, and for the third time a republic.

There existed in early times a popular belief that there was a natural order of political development through which all states must or would normally pass in the course of their history. Plato, for example, taught that the natural course of evolution was from aristocracy, the rule of the best, to timocracy, the rule of the military, then to oligarchy, then to the rule of the mob, and finally to tyranny.<sup>66</sup> Aristotle, while differing from Plato as to the order of development, nevertheless believed that forms of government followed one another according to a regular order of succession. According to his rule the state ordinarily began as a hereditary monarchy, which in time passed into an aristocracy. The latter in the course of time became an oligarchy, the oligarchy became a tyranny, and the latter ultimately evolved into a democracy. Ordinarily after an unsatisfactory experience with democracy a monarchy would be reestablished, and the cycle thus begun again would be passed through as before.<sup>67</sup> Polybius taught that in the beginning the strongest person physically in the state ruled, that is, the state began originally as a monarchy. Then followed a period when justice rather than physical power became the basis of the right to rule, during which time a form of government called by Polybius "royalty" (*Basileia*) prevailed. This form in time degenerated into tyranny, only to be overthrown eventually, and an aristocracy set up in its place. This in the course of time was succeeded by oligarchy, which in turn was overthrown by the people and a democracy was established.<sup>68</sup> Machiavelli laid down almost the same rule regarding the order of natural succession in respect to the political forms of ancient states.

The noted German scholar Schleiermacher maintained that political transformations are determined largely by the spread of political self-consciousness. At first, he said, political consciousness was not highly developed in any minds, though diffused equally among the masses. The democratic form of government naturally corresponded to this condition and was therefore the first state form. In the course of time a higher political consciousness developed and concentrated

<sup>66</sup> "The Republic," bk. VIII.

<sup>67</sup> See his "Politics," bk. VI.

<sup>68</sup> Livius, vol. I, p. 2.

itself in a few minds. This led to the establishment of aristocracy. Finally the state consciousness concentrated itself in a single individual, and monarchy, the highest form of state, succeeded.<sup>69</sup> There is a residuum of truth in the principle of Schleiermacher's law, but the weight of opinion is against the order in which he conceived political consciousness to have spread. It is more reasonable to believe that it existed at first in but one or at best only a very few minds, and that it grew and spread slowly and became dispersed throughout the mass of the population rather late in the life of the state. It seems more probable, therefore, that the order of succession was the reverse of that which Schleiermacher laid down; that is, the state began with a monarchical form of organization, which in time became aristocratic, and finally, when political consciousness became general, the organization of the state became democratic. History, indeed, shows that this has generally been the order of development.<sup>70</sup>

Bluntschli, a critic of Schleiermacher, maintained that the normal forms of government succeeded each other in the following order: first, theocracy; second, monarchy; third, aristocracy; and fourth, democracy. Each of these forms not infrequently passed through several transformations. For example, monarchy began in its pure form, then it became aristocratic (*stürmisch*) in character, and finally, democratic. Republics likewise passed through monarchical, aristocratic, and democratic stages.<sup>71</sup>

Regarding the merits of the rule laid down by the early writers in respect to the succession of state forms, there can be but one conclusion, namely, that such changes do not follow each other in accordance with any law such as reigns in the physical world. History

<sup>69</sup> See his "Über die verschiedenen Staatsformen." For a criticism of Schleiermacher's doctrine see Bluntschli, "Politik," pp. 309 ff.

<sup>70</sup> Compare Batbie, "Traité de droit public et administratif," vol. I, ch. 35. This author considers at length the succession and kinds of state forms and shows that generally, though not always, of course, monarchy, aristocracy, and democracy have followed each other in the order mentioned. The necessities of self-defense give rise, he says, to the first form of political organization, namely, a military monarchy. After the struggle which has produced it is over, the organization becomes aristocratic. Finally the masses demand and obtain a share in the management of public affairs, and the government becomes democratic in organization.

<sup>71</sup> "Politik," pp. 310-312; see also his "Allgemeine Staatslehre," bk. IV, ch. 10.

furnishes abundant evidence of this truth. For example, the early monarchies did not always pass into tyrannies, but often the latter resulted from strife among the leaders of an aristocracy. Not infrequently monarchies have been transformed into democracies, aristocracies into monarchies, and democracies into aristocracies. Bodin, in his treatise on the republic, gives numerous historical examples of such transformations. In more times monarchies have more often been succeeded by democracies than by aristocracies. During the sixteenth and seventeenth centuries in many states of Europe monarchical governments of an absolute type were erected upon the ruins of feudal aristocracies. A study of the subject, indeed, will show that the exceptions are more numerous than the rule. There are, of course, certain laws of political evolution, but no such sequence of succession as was described by the early writers. Not all states have passed through the same stages or undergone the same transformations. The changes that have occurred in some have been the result of internal revolution, in others the result of conscious adoption or imitation. Woolsey justly remarks that if there were such a law of succession as described by Polybius, it would afford a most hopeless prospect to the world.<sup>72</sup> It would, in short, mean the reign of fatalism and of death in the domain of politics.

<sup>72</sup> "Political Science," vol. I, p. 469. See also Leacock, "Elements of Political Science," pp. 46-47; Rousseau, "Contrat social," bk. III, ch. 11; and Laveleye, "Le gouvernement dans la démocratie," bk. V, ch. 2.

## CHAPTER XV

### ELEMENTS OF STRENGTH AND WEAKNESS IN DIFFERENT FORMS AND TYPES OF GOVERNMENT

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#### I. MONARCHY

**Monarchy : Where Found.**—From an examination of the structural organization of the various forms and types of government, we come now to consider in the light of history and of experience the

elements of strength and weakness of each. Of all the known types, the monarchial form is the oldest; in the Middle Ages it was universal or very nearly so, and in one form or another it still survives in various countries of Europe, Asia, and Africa.<sup>1</sup> The type of absolute monarchy has at last disappeared from Europe in the face of the irresistible march of democracy, but until recently it existed in varying degrees in several of the most important states of the continent. The late Professor Sidgwick declared that in the middle of the eighteenth century absolute monarchy was regarded as "the final form of government to which the long process of formation of orderly country-states had led up and by which the task of establishing and maintaining a civilized political order had been, on the whole, successfully accomplished, after other modes of political construction had failed to realize it."<sup>2</sup>

Mr. H. A. L. Fisher, another well-known English scholar, in a study devoted to the growth of the republican idea in Europe, published in 1911, declared that the cause of republicanism had made no substantial progress in Europe since 1870. France, he pointed out, was then the only great European state which had adopted the republican form, and he added that her experience had not been such as to invite imitation.<sup>3</sup> Republics, to be sure, had been set up in various countries of Europe, notably in the year 1848, but they were all short-lived, the monarchies which they displaced having been

<sup>1</sup> The political conditions of the Middle Ages were distinctly unfavorable to the growth of republicanism, and the belief was prevalent not only that monarchy was a necessity but also that it was divinely ordained. There were a few so-called republics in the sixteenth century, such as Florence, Venice, the United Provinces of the Netherlands, and the Swiss Confederation, but they were, with the exception of Switzerland, of an aristocratic type and would hardly be regarded as republics to-day. In the seventeenth century there were some apostles of republicanism like Milton, Harrington, and Sidney, but their dreams were never realized in their day. The eighteenth century was distinctly an age of enlightened despotism, and monarchy was universal. Monarchy was praised by writers like Bossuet, Turgot, Montesquieu, and others as the best of all governments, and Bossuet defended it as divinely ordained. The first modern European republic—the one which differed fundamentally from all preceding republics in that it was distinctly democratic—was that set up by the revolutionists in France in 1792, but it was short-lived. See Fisher, "The Republican Tradition in Europe," ch. 5.

<sup>2</sup> "Development of European Polity," p. 318.

<sup>3</sup> "The Republican Tradition in Europe," especially ch. 13.

quickly restored. On the whole, he thought the outlook for republicanism was not promising and he pointed out that in various countries such as Germany and Italy even the Social Democrats, the most advanced of political parties, were not anti-monarchical—at least not militantly so—but were content with demanding a more liberal suffrage and other democratic reforms which they regarded as more fundamental than the abolition of monarchy.

**Progress of Republicanism.**—Mr. Fisher attributed the failure of the republican movement to several causes. In the first place, the position of the monarchies which had seemed so precarious in 1848 had been considerably strengthened by the general elevation in the intelligence, character, and ability of the monarchs who reigned in Europe at the time he wrote, as compared with that of the monarchs who afflicted Europe in the earlier part of the century.<sup>4</sup> Sovereigns like Queen Victoria and Edward VII in England, Leopold II in Belgium, Christian IX in Denmark, Oscar II in Sweden, William I and William II in Germany, Francis Joseph in Austria-Hungary, and Victor Emmanuel II in Italy, commanded a popular respect and esteem in their respective countries which hardly existed before 1848, when the general level of esteem of monarchs was uniformly low. The achievements of the monarchy in Germany and Italy in bringing about the national unification of those countries, and the extraordinary material progress which had taken place under monarchial rule in those and other European states, had also been a contributing factor to the general feeling of contentment with the monarchial system. Mr. Fisher pointed out that in 1905 the people of Norway, a simple democratic people composed mostly of peasants, fishermen, shopkeepers, and sailors, deliberately chose the monarchial form in preference to a republic. There was a republican party in the country led by the novelist Björnson, but they were divided in regard to the

<sup>4</sup> Of the low level to which monarchy had sunk in England in the early part of the nineteenth century see Thackeray, "The Four Georges." Compare also Fisher *op. cit.*, pp. 320 ff. Commenting on the life and character of George IV at the time of his death, the London *Times* declared that there never was an individual whose death was less regretted by his fellow creatures; no eye ever wept for him; no heart heaved a throb of sorrow for him. "If George IV ever had a friend, a devoted friend, in any rank of life, we protest that the name of him or her has not yet reached us." Quoted by Sidney Low, "Governance of England," p. 278.

particular form which they wished, whether the American or the French. The argument that a monarchy would be more acceptable than a republic to both Germany and England, and the belief that the security and prestige of the country would be strengthened by the dynastic alliances which would result from the establishment of a monarchy, prevailed, and the republic was accordingly brushed aside.

In 1911 the monarchy in Portugal was overthrown and a republic was established in its place, but republicanism made no further headway in Europe until after the World War, when Germany and Austria became republics and when most of the new states which came into existence, and later also Greece and Spain, adopted the republican form. The Russians abolished the monarchy but the system which they established in its place is hardly that of a republic as the republican form is traditionally understood, and it is avowedly not a democracy. It may be noted however, that Yugoslavia elected the monarchial form and Hungary, whose form has not yet been definitely determined, remains a monarchy though as yet without a king. Several of the older monarchies, such as Belgium and Rumania, revised their constitutions and introduced a larger element of democracy, but the monarchy in both countries was retained. Italy, although her system of government has undergone radical alterations in the hands of the *Fascisti* party, likewise continues a monarchy and there appears to be little or no disposition to displace it for the republican form. In Great Britain, the Scandinavian countries, Bulgaria, and the Netherlands, the events of the World War effected no changes in the position of the monarchy and there is nothing to indicate that it will be displaced for the republican type in the near future. The result is that, leaving aside Russia and the petty protected states, the monarchial form survives in half of the countries of Europe.<sup>5</sup> Monarchy has never gained a foothold in North America (the French experiment in Mexico was a failure); it has disappeared from South America, where it once existed in Brazil. In Asia it exists only in Japan, Siam, Persia, and a few petty states; in Africa it survives in Abyssinia and Egypt.

<sup>5</sup> Monarchies are : Belgium, Bulgaria, Denmark, Great Britain, Hungary, Italy, the Netherlands, Norway, Rumania, Sweden, and Yugoslavia (11 countries).

Republics are : Austria, Czechoslovakia, Estonia, Finland, France, Greece, Germany, Latvia, Lithuania, Poland, Spain, Portugal, and Switzerland (13 countries).

**Elements of Strength.**—Bossuet in the eighteenth century eulogized the monarchical system of government as one which was not only recommended by the experience of history but one which, as stated above, was ordained by God. It was, he said, the most ancient, the most widely diffused, the best, and the most natural of all forms of government. All the world began with it and almost all the world had been preserved by it. It was not only natural but it was also the most dignified, and calculated to insure identity of interest between the ruler and the ruled, and the most conformable to that which God Himself had established.<sup>6</sup> Until the latter part of the eighteenth century it was widely believed to be the nearest approach to a perfect form of political organization that could be devised by the ingenuity of man. Of its merits the English philosopher and historian David Hume wrote near the middle of the eighteenth century : " Though all kinds of government be improved on in modern times, yet monarchical government seems to have made the greatest advance to perfection. It may now be affirmed of civilized monarchies, what was formerly said of republics alone, that they are a government of laws, not of men. They are found susceptible of order, method, and constancy to a surprising degree. Property is there secure ; industry is encouraged ; the arts flourish ; and the prince lives among his subjects like a father among his children."<sup>7</sup> And, he added, there are more " sources of degeneracy " to be found in free governments like England than in France, which was then, in Hume's estimation, " the most perfect model of pure monarchy," a judgment which Sir Henry Maine pronounced to be quite lacking in the essential elements of truth.<sup>8</sup>

A little later Turgot defended monarchy as a form of government which was peculiarly adapted to the promotion of the general happiness and welfare of mankind, since a monarch did not and could

<sup>6</sup> " La politique tirée des propres paroles de l'Ecriture Sainte." See also Fisher, *op. cit.*, p. 3, and Dunning, " Political Theories from Luther to Montesquieu," pp. 325 ff. Compare also the defense of Filmer in his " Patriarcha " (1680). The point of view of the apostles of the divinity of monarchy is explained in a sympathetic and judicial spirit by Figgis in his " The Divine Right of Kings," especially ch. 1.

<sup>7</sup> " Essays," no 12, entitled, " Of Civil Liberty."

<sup>8</sup> " Popular Government," p. 4.

not have any interest in making bad laws or in governing his people except for their own good.<sup>9</sup>

Our estimate of the value of monarchy cannot, however, be based upon the mere opinions of those who, like Turgot, were at the time its apologists or servants, or who, like Hume, wrote in an age when it was the almost universally accepted form of government and when it had few antagonists. It must be examined in the light of both reason and experience and on the basis of sound tests as to what constitutes good government. In passing judgment upon its merits it is also necessary to distinguish between the forms which monarchy may take or has taken in the past ; namely, the absolute type in which the monarch is the sole source of power and actually governs ; and the limited type in which he is merely the titular sovereign, restricted by constitutional limitations and actually governs through the agency of ministers who are responsible to the legislature or one chamber of it for their acts and policies. The first form of monarchy has been defended on the ground that it is a form of government which more than any other possesses the elements of strength, simplicity of organization, ability to act quickly, unity of counsel, continuity and consistency of policy, and a certain prestige in the conduct of foreign relations.<sup>10</sup> It is also claimed that the laws in an absolute monarchy are more easily enforced because the monarch has a free hand to select skilled officials and he can therefore hold them to a stricter accountability than is possible in a democracy, where they are popularly elected for definite terms and cannot be recalled or dismissed before the expiration of their fixed and limited terms. Finally, it is claimed that monarchial government is more conducive to social justice as among the different classes of society for the reason that the monarch, not being dependent upon popular election and being himself above all parties or classes, is likely to be impartial and even sympathetic toward the masses of his subjects.<sup>11</sup> Even Rousseau, himself a radical democrat

<sup>9</sup> Quoted by Fisher, *op. cit.*, p. 64.

<sup>10</sup> "Of all systems of government," says Pradier-Fodéré, "monarchy is the most simple, its action the most prompt and most energetic, and it has been adopted by the greatest number of nations." "Principes généraux de droit de politique," etc., p. 243.

<sup>11</sup> "Raised above all parties," said Treitschke (*Politics II*, 60), "the king is naturally drawn to the weak and humble of his subjects ; as Frederick the Great said : 'to be the friend of the poor has ever been the glory of monarchy' —

in his day, admitted that absolute monarchy was not without merits. "Where such a system prevails," he said, "the will of the people and the will of the prince, the public force of the state, and the individual force of the government all respond to the same motive power; all the springs of the machine are in the same hand, all look to the same end. There are no opposing movements which destroy each other and no sort of constitution can be imagined in which a slight effort produces greater action." Rousseau went on to compare a skillful monarch governing his people throughout a vast state and making everything move while seeming himself immovable, to an engineer seated tranquilly on the shore of a sea and setting in motion without difficulty a huge vessel upon the waters.<sup>12</sup>

In the early stages of civilization monarchy is undoubtedly well adapted to the needs of a people who have not yet developed a high political consciousness and who therefore lack the capacity themselves for participating actively in the management of public affairs. Perhaps no better form could be devised for disciplining uncivilized peoples, leading them out of barbarism, and inculcating in them habits of obedience. John Stuart Mill well remarked that "despotism is a legitimate mode of government for dealing with barbarians, provided the end be their improvement and the means be justified by actually effecting that end." "Liberty," he observed, "as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then there is nothing for them but implicit obedience to an Akbar or a Charlemagne, if they are so fortunate as to find one."<sup>13</sup> The absolute monarchies of the medieval and early modern times justified their existence through their work of consolidation and nationalization. "The seventeenth and eighteenth centuries," says Bryce, "saw many reforms in European countries which no force less than that of a strong monarchy could have carried through."<sup>14</sup>

monarchy implies the idea of equal justice for all, which is realized in the person of the king.—Even today it may be said with truth that in spite of all hostile agitators the mass of the people (in Germany) have more confidence in the Crown than in parliament."

<sup>12</sup> "Contrat social," bk. III, ch. 6.

<sup>13</sup> "On Liberty," p. 23.

<sup>14</sup> "Modern Democracies," vol. II, p. 536.

**Defects of Absolute Monarchy.**—But most of the claims that have been made for absolute monarchy have not stood the test of experience. In the last analysis it is a government constituted and administered by a single person according to his own sense of what is best and right for those over whom he reigns, and history abundantly confirms the truth of the assertion that such governments have more often been administered in the interests of the monarch himself than in the interests of his subjects.<sup>15</sup> "It has long been a common form of speech," said John Stuart Mill, "that if a good despot could be insured, despotic monarchy would be the best form of government."<sup>16</sup> But, as he went on to remark, it is a most "pernicious misconception of what good government is." Assuming for the sake of argument that absolute power in the hands of one individual would never be abused, but on the contrary would insure an honest and intelligent administration of the government; granting that good laws would be enacted and enforced, that equal justice would be dealt out to all, that the public revenues would be wisely expended; in short, that the despotism were the wisest and most benevolent conceivable, there are still other considerations which render it far from being the ideal polity. Administrative efficiency is only one of the tests of a good government. No government which does not rest upon the affections of the people, which does not stimulate among them an interest in public affairs and create an active, intelligent, and alert citizenship, can be called ideal;

<sup>15</sup> Compare Sidgwick ("Development of European Polity," pp. 412-413), who remarks that it is not only a defect of monarchy in the sense in which we are here considering it, that the supreme lawmaking power is in the hands of a single individual, who may or may not employ it in the interests of the community, but that the execution of the laws being under the supreme control of the same person, there is no sufficient guarantee that he will observe his own laws, if passion or favor urges him to break them. See also George Cornewall Lewis, "Government of Dependencies," p. 20.

<sup>16</sup> "Representative Government," ch. 3. "The tendency of all monarchy," declared Lord Brougham, "is towards despotism and its evils; and a constitutional monarchy which provides no checks, that is, a pure monarchy, has enormous defects, even if it should not degenerate into an Oriental despotism. It leaves too great scope to the sovereign's interests or passions, benefits the people very little by the alliance he always forms with the nobles, gives facilities to humour his ambition by wars, allows reckless extravagance of every kind, encourages habits of costly ostentation and of pride towards inferiors, and begets a spirit of fawning and truckling towards those in authority." "The British Constitution," "Works," vol. XI, p. 3.

and, certainly, no government from which the participation of the people in some form is excluded will ever be able to produce such a body of citizens.<sup>17</sup>

Even if all the claims which have been put forward in defence of absolute monarchy were justified, this form of government still leaves too much to chance or accident. Where a ruler derives his office and power by inheritance, there is no guarantee that a wise, capable, and benevolent person will succeed to the office. On the contrary, there is always the possibility that an imbecile or a fool rather than a sage or a statesman may succeed to the throne and be charged with governing and determining the destinies of millions of people. History affords numerous examples of immature, feeble-minded, and incompetent rulers succeeding to thrones under the operation of such a principle. France, for example, was governed for more than five hundred years by kings who had not reached the age of twenty-five years at the time of their accession to the throne, and for nearly one hundred years by kings who had not attained the age of twenty-one.<sup>18</sup>

<sup>17</sup> Compare Goodnow ("Comparative Administrative Law," vol. II, p. 10), who asserts that "the prime end of all governmental systems should be the cultivation in the people of a vigorous political vitality, a patriotic loyalty, and social solidarity."

<sup>18</sup> Sismondi, "Etudes sur les constitutions des peuples libres," quoted by Woolsey, "Political Science," vol. I, p. 521. Lee, in his life of Queen Victoria (p. 53), referring to the situation at the time of her accession in 1837, says: "Since the century began there had been three kings of England....of whom the first was long an imbecile, the second bore the reputation of a profligate, and the third was regarded as little better than a buffoon." "No race of kings," said Jefferson, "has ever presented above one man of common sense in twenty generations." "There is not a crowned head in Europe whose talents or merits would entitle him to be elected a vestryman by the people of any parish in America." In two books entitled "Heredity in Royalty" (1906), and "The Influence of Monarchs" (1913), Dr. F. A. Woods, an American biologist, has made a detailed study of a large number of European monarchs from the point of view of their intellectual and moral character. He reaches the conclusion that dynastic families have "far exceeded the masses in the production of men of genius," that "royalty as a whole has been decidedly superior to the average European in capacity," and "that the royal breed, considered as a unit, is superior to any other one family be it that of noble or commoner." Of 27 French kings (from Philip I to Louis XIII) 12 are classified as licentious, 7 doubtful, and 8 as chaste. Of these 8 were cruel and 8 doubtful. Of 23 English kings (from William II to Charles I) 8 are classified as licentious, 4 doubtful, and 11 as chaste. Of these 6 were cruel and 8 were doubtful.

Farrer, in his "The Monarchy in Politics" (1917), concludes his elaborate

Wise, capable, industrious, and benevolent kings have by no means been lacking, especially in the nineteenth century, but the number who have sympathized with and defended the interests of the masses as against those of the aristocratic classes has been still smaller. In this connection, Lord Bryce remarked that "history, however, if it credits some kings with conspicuous services to progress, tells us that since the end of the fifteenth century, when the principle of hereditary succession had become well settled, the number of capable sovereigns who honestly labored for the good of their subjects has been extremely small." Spain, for example, for three centuries following the abdication of Charles V, had no reason, he added, to thank any of her kings, nor had Hungary, Poland, or Naples.<sup>19</sup>

study of the English monarchy as follows : "That an hereditary monarchy has advantages over an elective one is among the few things that historical experience can confidently claim to have proved. Lord Beaconsfield's dictum ("Speeches," II, 492) that our ancestors had done wisely in placing the prize of supreme power outside the sphere of human passions and ambitions hardly admits of serious challenge. But hereditary monarchy suffers from the drawback of placing that prize too much within the sphere of pure and uncontrollable chance ; and the same system which made a Queen Victoria possible is also responsible for a George IV. Experience, therefore, though it has proved the superiority of an hereditary to an elective monarchy, cannot yet assert the superiority of an hereditary monarchy to a republican form of government" (p. 333). Referring to the character of the British monarchy during the reign of George III, Farrer declares that under no republican system would it have been possible for the emancipation of the Catholics to have been deferred from 1801 to 1829—a delay which was mainly attributable to monarchs like George II and his son. The prolongation of the war of American independence, the war with republican France, and the unfortunate history of Ireland, Farrer also lays at the door of the British monarchs (p. 331).

<sup>19</sup> "Modern Democracies," vol. II, p. 537. Rousseau, whose statement regarding the strength of monarchical government has been quoted above, strongly condemned it for other reasons (*op. cit.*, bk. I, ch. 6). It is a kind of government, he said, where "everything, it is true, works for the same end ; but this end is not the public welfare." One inevitable defect, he said, which will always render it inferior to a republican government, is that under the latter "the public voice hardly ever raises to the highest posts any but enlightened or capable men, who fill them honorably, whereas those who succeed in monarchies are most frequently only petty mischief-makers, petty knaves, and petty intriguers"—a statement which, however, is far from being in accord with the facts. The fact that in the monarchy under which he was then living Richelieu, Mazarin, and Colbert were raised to the highest posts is a refutation of the truth of the second part of his statement. The history of modern democracy, unfortunately, also affords abundant illustrations of the falsity of his statement that in republics only "enlightened and capable men" are raised to the highest posts.

**Merits of Limited Monarchy.**—In the last analysis the merits and demerits of limited monarchy,—if it be one in which the monarch is nothing more than the titular sovereign, the actual government being carried on merely in his name by ministers who represent the majority party in the legislature (or one chamber of it) and who are responsible to it for the manner in which they exercise their power,—are mainly those which result from having a titular head of the state who is not elected by the people or by the legislature but who acquires his office by right of hereditary succession. It is this latter feature, as has been pointed out above, which really distinguishes a monarchy from a republic. So far as the source of actual power and the processes of government are concerned, a monarchy may be as much a democracy as is a republic. This is true to-day of Great Britain, Belgium, and some other states which are officially classified as monarchies. In Great Britain, especially, the king is little more than the titular or ceremonial head of the state ; he is a sort of Merovingian *roi-fainéant*—subserving somewhat the same purpose that a cupola or an ornamental façade does to a building of which it is a part. He reigns but does not govern ; he has, as Bagehot remarked, the right to be consulted, the right to encourage, and the right to warn—rights which may, in the hands of a strong, vigorous, highly respected monarch, be exercised with some effect. But after all, when the advice and warning have been given, the final decision rests with the ministers ; it is for them to determine whether the opinion of the king ought to be respected or disregarded. To take a notable example, the influence of Queen Victoria of England was not without effect, especially in foreign affairs, and particularly during the later years of her life, but it was the result in large part of the respect due to her long experience, her advanced age, and her unblemished character. On the whole, her actual influence upon the policies of the government was not in proportion to the great industry and activity which she displayed.<sup>20</sup> The same thing may be said of

Treitschke, who glorified monarchy above all other forms of government, was bound to admit that "much depends not only upon the real character of the monarch, but upon the idea which the people have of him." He admitted that some countries had been "particularly afflicted in their dynasties"; thus Piedmont was the only state in Italy which had had good kings, while "unhappy Spain" could boast of only two since Philip II who could even be called good men (*ibid.*, p. 67).

<sup>20</sup> Compare Lowell, "The Government of England," vol. I, p. 47. The

other monarchs in England and elsewhere where the pure type of responsible cabinet government prevails. In earlier times the reverence of the masses for a hereditary ruler more or less mystical and quasi-divine was a powerful bond of attachment and loyalty to the state. Bagehot, in his work on "The English Constitution" published in 1872, considered this to be an important element in estimating the value of the English monarchy, and in old Russia the almost superstitious veneration of the masses for the Czar produced the same result in an even larger degree.<sup>21</sup> But with the general increase of political intelligence among the people of Great Britain and other countries where monarchy exists, the masses have lost much of their reverential spirit toward the wearer of the crown and consequently the value of the monarchy as a loyalty-implanting institution has largely declined.

Advantages claimed for monarchy in the conduct of foreign affairs are considered by Barthélemy in his "Démocratie et politique étrangère" (1917), pp. 16 ff., and his conclusion is that the faults of republican diplomacy have been "neither more frequent nor serious" than those of monarchical diplomacy (p. 31).

It has been asserted by some writers that monarchies are more warlike and less realistic than republics, and, as is well known, Kant saw in the substitution of republics for monarchies the way to perpetual international peace. Elihu Root, in an address in 1915 on "The Effect of Democracy on International Law" (*Proc. Amer. Socy. of Int. Law*, 1915, pp. 2 ff.), maintained that the substitution of democracy for autocracy throughout the world would conduce to the promotion of international peace by removing one of the chief forces which has caused nations in the past to "break over and destroy the limitations of the law." But the superiority thus claimed for republics has been denied. Thus Farrer points out that it was the influence of Queen Victoria which kept England out of war with Germany in 1864, and he might have added that it may have been her influence which kept the peace between England and the United States during the American Civil War. It may also be doubted whether the American republics, especially those of Latin America, have been less liable to war than the monarchies of Europe. Lord Salisbury once spoke of the "thirst for empire and a readiness for aggressive war" as a characteristic of democracy ("Essays," II, 97). Farrer (*op. cit.*, p. 334) remarks that "a democracy under modern conditions, sensitive to every gust of rumor, and to every whiff of passion that is fanned by the press, is subject to no restraint from war like that which may operate in a pacific monarch." Barthélemy (*op. cit.*, pp. 258 ff.) considers in detail the question whether democracies are more pacific than monarchies and his conclusions are the same as those of Farrer.

<sup>21</sup> "It fascinates the plain man," says Treitschke ("Politics," II, p. 68), "to see a single figure at the helm on whose word all depends, and for such the term 'father of his people' has genuine meaning—when the monarch is penetrated with a sense of lofty duty, it is glorious to behold the purifying influence of his exalted office!"

Nevertheless, it must be admitted that in other respects it serves a useful purpose. Mr. Lowell has pointed out that the parliamentary system of Great Britain would be inconceivable without a titular figurehead occupying a position above the clash of parties and tumults of politics. If, he adds, "the English crown is no longer the motive power of the ship of state, it is the spar on which the sail is bent, and as such it is not only a useful but an essential part of the vessel."<sup>22</sup> It is quite true that an elective presidential figurehead might subserve the same purpose, as it does in France. In England, where the monarchy is undoubtedly very popular, it is believed that the advantages of a system under which there is an orderly and uninterrupted succession to the office outweigh the disadvantages and inconveniences inseparable from the method of popular election. Besides, the probabilities are that the masses will have greater respect for a hereditary chief of state than for one who acquires his office as a result of party strife. In Great Britain and the dominions, it is almost universally admitted that the monarchy subserves a special purpose in holding together the different parts of the far-flung empire. This is conceded even by the leaders of the Labor party.<sup>23</sup>

<sup>22</sup> *Op. cit.*, Vol. I, p. 49. Mr. Lowell remarks that a small republican group in England once criticized the monarchy as useless and expensive, but he adds that the people have now learned that republics are not economical and that the real cost of maintaining the throne is relatively small. He further observes that the objections to the monarchy have almost entirely disappeared and that "there is no republican sentiment left today either in parliament or the country" (*ibid.*, p. 52). Lord Birkenhead in his address before the American bar association, referred to above, asserted that the prestige and influence of the English monarchy had increased since the accession of the present king. No great decision of state, he said, would be taken by the cabinet without close discussion with him and that he had done as much to strengthen the monarchy as any of his predecessors. Strachey in his "Queen Victoria" (pp. 301, 303) asserts that while the *power* of the Crown has diminished since 1837 the *prestige* of the sovereign has undoubtedly increased. Marriott points out that there are still frequent opportunities for the king to exert an influence on political events and especially in the domain of foreign affairs. See his "The Mechanism of the Modern State," especially vol. II, ch. 24.

<sup>23</sup> For example by J. H. Thomas, "When Labor Rules" (1920), pp. 45-47. "There can be no question among thoughtful people," he says, "that the monarchy plays a large part in holding the British Empire together—Labor recognizes the wisdom of having an hereditary monarch." For a good discussion of the advantages of the hereditary monarchy, see Sidgwick, "Elements of Politics," pp. 437-442. A strong advocate of hereditary monarchy was Dr. Paley, who declared that it was universally to be preferred to an elective government.

## II. ARISTOCRATIC GOVERNMENT

**Forms of Aristocracy Distinguished.**—In evaluating the strength and weakness of aristocratic government it is necessary to distinguish between the several forms in which it manifests itself or has manifested itself in the past. As pointed out in a preceding chapter, there have been aristocracies of birth or family; aristocracies of wealth; aristocracies of culture and education; aristocracies of elder statesmen; military and even priestly aristocracies; natural and artificial aristocracies; etc. Manifestly they do not all possess the same virtues or the same vices, nor the same elements of strength or of weakness. Whatever may be the method or basis of classification or the form which aristocracy may take, the general principle is the same; namely, that aristocratic government is government by a comparatively small portion of the population. If as a form of government it meant what the etymological derivation of the word implies, it would, as De Parieu remarked, undoubtedly be the best kind of government in the world.<sup>21</sup> Interpreted in the sense of government by the *best*, it is the government par excellence, the only government in fact which can be defended on sound and rational principles. Sir James Stephen remarked that the wise and good should govern in all countries; but, as Seeley observed, if "good" is only a euphemistic name, meaning simply a quality

"Political and Moral Philosophy," p. 215. Treitschke defended monarchy as distinctly superior to democracy. "It is an ancient experience," he said, "that monarchy presents more perfectly than any other form of government a tangible expression of political power and national unity. Hence its marvelous appeal to the average understanding and to natural reason, of which we Germans saw such a striking example in the early years of our new Empire." "Politics," vol. II, p. 59. Again, "it is clear that a well-ordered monarchy can guarantee a much higher degree of freedom (than democracy) to its subjects" (*ibid.*, p. 775). "Furthermore, it is possible for a monarch from the height of his exalted station to see further than ordinary mortals, who survey only a narrow sphere of practical life and whose limitations are revealed by their well-nigh incredible prejudices." This is especially true, he argued, in respect to foreign affairs. "A monarch is competent to judge of external relations in a manner far beyond the scope either of private individuals or of republican administration" (*ibid.*, p. 61). Among other advantages of monarchy, according to Treitschke, are those resulting from the family relations and connections of the heads of monarchical states, the greater foresight of monarchs, and the force of tradition which is more powerful in monarchies than in republics. Finally, monarchy is government by men of action rather than of the "brainless power called public opinion" (*ibid.*, p. 66).

<sup>21</sup> "Principes de la science politique," p. 56.

possessed by the wealthy or well-born, then aristocracy is only a euphemistic name for oligarchy, which is itself a perverted or "diseased" form of aristocracy.<sup>25</sup> Formerly aristocracy was one of the most respected, as it was one of the most widely distributed, of all forms of government; but in recent years the name has come to have an unsavory if not a disreputable connotation.<sup>26</sup> Ancient writers like Aristotle, as has been said, carefully distinguished between aristocracy, which they defined as government by the "best," and oligarchy, which they described as government by a wealthy minority in their own interest.<sup>27</sup> But to-day this distinction has largely disappeared, so that aristocracy connotes in the popular mind the same characteristics which the ancient, associated with oligarchy.

**Strength of Aristocracy.**—One of the distinguishing characteristics of aristocracy is that it emphasizes quality rather than quantity, character rather than mere numbers.<sup>28</sup> It assumes that some are better fitted to govern than others, attaches great weight to experience and training as political virtues, and seeks to reward special talent and attract it into the public service. It is preëminently conservative government; it honors authority, especially when it has had the sanction of long acquiescence, and has special reverence for long-established custom and tradition. It strikes its roots deep in the past and distrusts innovation, especially when it involves the laying of violent hands upon institutions which have become venerable with age. Where it is associated with monarchy and democracy, it acts as a tempering and restraining element. It curbs the passions of democracy and holds in check the absolute tendencies of monarchy.<sup>29</sup> In this sense it is, said Lord Brougham, a necessary part of a governmental system, since "nothing else can protect liberty from an arbitrary sovereign or from the more insupportable tyranny of the irresponsible multitude."<sup>30</sup> The very soul of it, said Montesquieu, is moderation founded on virtue.

<sup>25</sup> "Introduction to Political Science," pp. 323, 331. See also Lewis, "Use and Abuse of Political Terms," pp. 72-74.

<sup>26</sup> Compare Sidgwick, "Elements of Politics," p. 608.

<sup>27</sup> Aristotle, "Politics," IV, 7; IV, 14; V, 6.

<sup>28</sup> Compare Bluntschli, "Politik," p. 282.

<sup>29</sup> Compare De Parieu, "Principes de la science politique," pp. 59-60.

<sup>30</sup> "Works," vol. XI, p. 20. That aristocracy is not incompatible with liberty

It possesses an inherent vigor, he declared, unknown to democracy.<sup>31</sup> Napoleon has been quoted as saying that aristocracy was the sole support of monarchy, its lever, its resisting point; that a state without it is a vessel without a rudder, a balloon in the air.<sup>32</sup> Naturally jealous of its exclusive privileges and always apprehensive of its own security, it has every reason for refraining from an unwise and immoderate use of its power. Thus it avoids rash political experiments and advances only by cautious and measured step.<sup>33</sup> If the principle of selection were always that of intrinsic worth, it is difficult to see what could be said against aristocratic government *qua* government. Considered from the standpoint of the quality of the government itself, without reference to its effect upon the masses who are excluded from participation in political affairs, government by the most capable few undoubtedly possesses distinct elements of strength and efficiency which are conspicuously absent from a system in which the untrained and uneducated masses hold the reins of power. John Stuart Mill remarked that "the governments which have been remarkable in history for sustained mental ability and vigor in the conduct of affairs have generally been aristocracies," but he added that they had been "without exception aristocracies of public functionaries—that is, of men who have made public business an active profession and the principal occupation of their lives."<sup>34</sup>

Milton asserted in "Paradise Lost":

"If not equal all, yet free,

Equally free: for orders and degrees

Jar not with liberty, but well consist."—bk. V, 791-793.

<sup>31</sup> "Esprit des lois," bk. III, ch. 4.

<sup>32</sup> Bolingbroke in his defense of aristocracy said, "The Author of Nature has thought fit to mingle from time to time, among the societies of men, a few, but only a few, of those on whom He is graciously pleased to bestow a larger proportion of the ethereal spirit than is given in the ordinary course of His providence to the sons of men. These are those who engross almost the whole reason of the species, who are born to instruct, to guide, and to preserve; who are designed to be the tutors and the guardians of human kind." "On the Spirit of Patriotism," p. 2.

<sup>33</sup> The redeeming qualities of this form of government, remarked Lord Brougham, are its firmness of purpose, resistance to violent change, distrust of warlike policy, and encouragement of genius. "Works," vol. XI, p. 3.

<sup>34</sup> "Representative Government," p. 45. A labored defense of aristocracy will be found in Ludovici, "A Defense of Aristocracy" (1915). This author denies that his book is merely an argument in defense of aristocracy, for, he says, "to all thinking men, who know, it needs no defense—an argument would be simply platitudinous." Preface, p. viii.

**Weakness of Aristocracy.**—But the weakness of aristocracy as a practical system of government lies in the difficulty of finding any sound and just principle of selection by which the fittest, politically speaking, may be segregated from the unfit, and, when this is done, of providing adequate security against the temptation of the former class to exercise their power in their own interest. It is now generally agreed that the most capable and fit of the population cannot be selected by conferring the power to govern upon certain families and their descendants, for political capacity and honesty are qualities not always transmitted from father to son.

**Modern Defenders of Aristocracy.**—There were formerly, however, some highly respected writers who defended under certain limitations aristocracies constituted on the hereditary principle. Sir Henry Maine, for example, expressed the opinion that the chances of getting capable persons into the service of the state are as great under the principle of hereditary succession as under a system of popular election.<sup>35</sup>

"A man," said Professor Seeley, "who is the son of a statesman, who has grown up in the house of a statesman, may be presumed to have learnt something, if only some familiarity with public questions, some knowledge of forms of routine which others are likely to want; and there is a fair probability that he may have acquired more, and a certain possibility that, as the younger Pitt, he may have acquired very much and also inherited very much."<sup>36</sup>

Lecky, in a defense of the English aristocracy, commenting on a saying of Benjamin Franklin that there was no more reason for hereditary legislators than for hereditary professors of mathematics, and that it was absurd to expect that the eldest son of a single family should always display exceptional or even average capacity, remarked : "But

<sup>35</sup> Thus he says ("Popular Government," p. 188) : "Under all systems of government, under monarchy, aristocracy, and democracy alike, it is a mere chance whether the individual called to the direction of public affairs will be qualified for the undertaking; but the chance of his competence, so far from being less under aristocracy than under the other two systems, is distinctly greater. If the qualities proper for the conduct of government can be seened in a limited class or body of men, there is a strong probability that they will be transmitted to the corresponding class in the next generation, although no assertion be possible as to individuals."

<sup>36</sup> "Introduction to Political Science," lect. VI.

it is not absurd to expect that more than five hundred families, thrown into public life for the most part at a very early age, animated by all its traditions and ambitions, and placed under circumstances exceedingly favorable to the development of political talent, should produce a large amount of governing faculty. . . . The qualities required for successful political life are not, like poetry or the higher forms of philosophy, qualities that are of a very rare and exceptional order. They are for the most part qualities of judgment, industry, tact, knowledge of men and of affairs, which can be attained to a high degree of perfection by men of no very extraordinary intellectual powers. . . . Few persons, I think, will dispute the high average capacity for government which the circumstances of the English aristocratic life tend to produce."<sup>37</sup> Of the value of such an aristocracy to the state Lecky went on to say : "It is of no small importance that a nation should possess a class of men who have a large stake in the prosperity of the country, who possess a great position independent of politics, who represent very evidently the traditions and the continuity of political life, and who, whatever may be their faults, can at least be trusted to administer affairs with a complete personal integrity and honor. In the fields of diplomacy and in those great administrative posts which are so numerous in an extended empire, high rank and the manners that commonly accompany it are especially valuable, and their weight is not the least powerfully felt in dealing with democracies."<sup>38</sup>

**Principles of Selection.**—But when all is said that can be said in favor of birth as the principle of selection, the fact remains, as Seeley readily admitted in his defense of the system, that it works

<sup>37</sup> "Democracy and Liberty," vol. I, pp. 314, 317.

<sup>38</sup> "Democracy and Liberty," vol. I, p. 321. In the same sense see Paley, "Political and Moral Philosophy," bk. VI, ch. 6. Treitschke defended aristocracy as a form of government but he admitted that it possessed inherent defects which rendered it much less desirable than monarchy. It is, he said, "always difficult to manage because it is founded upon a conception of class distinctions which is undoubtedly at variance with the natural instincts of equality in the human race"; it is founded on the idea that one class is superior politically to another; "there is something terribly inhuman and arrogant in a purely aristocratic temper of mind"; unlike monarchy, aristocracies "look coldly upon the development of great and original personalities"; "they will not always permit great military glory to be won"; jealous of the monarch, they begrudge the crown of victory to their generals, etc. For these reasons aristocracies are unendurable; in all highly developed nations, pure aristocracies have disappeared; they belong therefore entirely to history. "Politics," vol. II, ch. 19.

for the false aristocracy as well as the true, and that the worst traits are transmitted as well as the best.

The possession of property is an equally unsatisfactory test of political capacity, especially if it be inherited wealth. And so with all other tests which do not rest upon intrinsic merit. Yet the fact that no just or adequate tests can be found really proves nothing against aristocracy itself. The question of whether there ought to be a test by which to determine the fitness of men to exercise a share in the government, as Seeley observed, is not answered by showing that wealth is not such a test and that birth is not such a test.<sup>39</sup> The trouble is not so much with aristocracy, as with the lack of a just and satisfactory selective test.

Rousseau and Jefferson, both champions of democracy in their respective countries, emphasized the distinction between what they called natural aristocracies and artificial or "sham" aristocracies. Rousseau considered elective aristocracies to be the only natural ones, and these he pronounced the "best of all governments," since they insured "probity, enlightenment, experience, and all the other guarantees that the government would be wisely administered." In a word, he said, the best and most natural order is where the wisest govern the multitude, if there is any guarantee that the government will be conducted for the benefit of the people and not for themselves.<sup>40</sup> Jefferson agreed with Rousseau in declaring all aristocracies based on wealth or birth to be "not only useless but also mischievous and dangerous," though he was a strong defender of those based on "virtue and talent."<sup>41</sup> Contrary to the popular belief, he was a believer in aristocratic government when the aristocracy was of the latter kind.<sup>42</sup> "There is," he said, "a natural aristocracy founded on talent and virtue which seems destined to govern all societies and all political forms, and the best government

<sup>39</sup> The oppression which has come from tyrannous minorities in the past has, as Seeley remarks, come not from aristocracies, but from corrupt oligarchies. Much of the objection that has been directed against aristocracy, therefore, would be more defensible if it were directed against oligarchy. If the right test could be devised by which oligarchy could be avoided, we should have only pure and true aristocracies, and they would be hailed with delight by every one. *Op. cit.*, p. 347.

<sup>40</sup> "Contrat social," bk. III, ch. 5. It was pronouncements such as these that led Gambetta to remark that Rousseau was at heart an aristocrat.

<sup>41</sup> "Works," vol. IX, p. 425.

<sup>42</sup> Compare Merriam, "American Political Theories," p. 156.

is that which provides most efficiently for the purity of the choosing of these natural aristocracies and their introduction into the government." Artificial aristocracies have always been hated by the masses because they are constituted on the theory that some are born to rule and others to be their subjects, or because the rich are regarded as more qualified than the poor, merely by reason of their wealth. All of them, whether natural or artificial, are apt to be narrow and exclusive, and are inclined to arrogance and excessive conservatism which at times retards wholesome progress.<sup>13</sup>

We are entitled by deductions from history, says Woolsey, to lay down the principle that aristocracy is ordinarily capable of no long continuance, when it is the sole governing or by far the strongest power

**All Governments Partly Aristocratic.**—In the government by a small class, differentiated from the rest of the population by distinctions of birth and wealth, aristocratic government has virtually disappeared in all civilized states, although there still remain traces of it in states which have hereditary executives, where one of the legislative chambers contains hereditary or appointive elements, or where the suffrage is narrowly restricted by educational, property-owning, or other similar tests.

Yet aristocracy in some form is a principle which all states have admitted and to some extent followed in practice.<sup>14</sup> In all ancient states, democracies and aristocracies alike, large classes of persons were excluded from participation in public affairs. The laboring classes everywhere have been enfranchised only in comparatively recent years. In England, at the beginning of the eighteenth century one of the

<sup>13</sup> Compare Bluntschli, "Allgemeine Staatslehre," I<sup>k</sup>, VI, ch. IV. See also Lord Brougham, "The British Constitution," "Works," vol. XI, p. 3, for a discussion of the evils of the aristocratic form. "There never was an aristocracy," said Laveleve, "more devoted to liberty or more fitted to govern than that of England, yet it opposed every extension of the suffrage and often in legislation it sacrificed the interests of the people to its own privileges." For a full discussion of aristocracy as a form of government see De Parieu, "Principes de la science politique," ch. 3.

<sup>14</sup> "Political Science," vol. II, p. 1.

<sup>15</sup> "Almost all the nations," observed De Tocqueville, "which have exercised a powerful influence upon the destinies of the world by conceiving, following up, and executing vast designs—from Rome to England—have been governed by aristocratic institutions." "Democracy in America," vol. I, p. 256.

freest of states, the lower classes and a large proportion of the middle classes were excluded from all share in the government of the country. And the same was true to a less degree in America for a considerable period after the colonies became independent. Modern democracies no longer exclude the laboring classes, yet practically all of them apply standards of fitness, even if they sometimes apply them indirectly and in a manner unconsciously. Lord Bryce emphasized that in fact all governments are aristocratic in a sense. No observer, he said, could fail to be impressed by the fact that the world is governed by an extremely small number of persons. "In all assemblies and groups and organized bodies of men, from a nation down to the committee of a club, directions and decisions rest in the hands of a small percentage, less and less in proportion to the larger size of the body, till in a great population it becomes an infinitesimally small proportion of the whole number. This is and always has been true of all forms of government, though in different degrees." He cites the government of India as an excellent example of a government by "an enlightened, hard-working, disinterested, very small official class." Even in large democratic countries like Great Britain and France and especially the United States the public opinion which influences and determines policies is made by a very small percentage of the total population.<sup>46</sup>

### III. DEMOCRATIC OR POPULAR GOVERNMENT

**Democratic Government Defined.**—Democratic or popular government, as was pointed out in a previous chapter, has been variously defined as a form of government in which every one has a share, as one in which the majority rules, one in which the mass of the adult male population has a voice, one in which public opinion controls, etc. Abraham Lincoln conceived democracy to be the government *of* the people, *for* the people, and *by* the people. In estimating the strength and weakness of this form of government we may disregard the shades of difference which characterize the various concep-

<sup>46</sup> "Modern Democracies," vol. II, pp. 542 ff. Compare also Mallock ("The Limits of Pure Democracy," ch. 4), whose principal thesis is that democracy as a form of government, strictly speaking, does not exist anywhere and never has existed; what is popularly called democracy being in fact an oligarchy, that is, a government by a relatively small number of persons.

tions and proceed on the general assumption that a democratic government is one which is constituted and administered on the principle that every adult citizen (the present-day conception would include women as well as men) who is not regarded as unfit by reason of his having been convicted of crime, or in some countries because of his illiteracy, should have a voice, at least in the choice of those who make the laws by which he is governed, and that his voice should be equal in weight to that of every other elector.

The governments of some states which are regarded as democratic do not come fully up to this standard ; some, on the other hand, go further and are organized on the principle that an illiterate citizen is qualified equally with a literate person to exercise a share in the government to which he is subject, and that this share cannot be justly limited to the choosing merely of legislative representatives. In the states of the American Union, for example, voters have the right to nominate and choose many executive and administrative functionaries (in most of the states also the judges of the courts), and in this and other countries where the principle of the referendum has been introduced, the voters have in addition an extensive power of direct legislation and determination of public policies. But whatever the differences of practice, they are largely differences of degree. In general, the democracies of to-day rest on the principle that every honest, self-supporting adult citizen is qualified to participate in the business of government, and that on the whole he is as well qualified as any other of his fellow citizens.<sup>17</sup> They rest, said Jefferson, on confidence in the self-governing capacity of the great mass of the people, and in the ability of the average man, or of average men, to select rulers who

<sup>17</sup> The theory is that if some of the enfranchised are really unfit the general average—the “divine average,” as Walt Whitman described it—will be high enough to offset the danger. In reference to the abandonment of class rule, Lord Bryce (*op. cit.*, I, p. 148) observed that “it was believed that by sinking a deep shaft into the humbler strata of society the spring might be tapped of a simple honesty and sense of justice which would renovate polities.” The average man, he adds, may have a limited knowledge and no initiative, but what he lacks in knowledge he may make up for by shrewdness of judgment and a sympathetic comprehension of the worth of his fellow men. In a sense, therefore, the people may be wiser than the wisest individual or group. Lincoln’s aphorism regarding the impossibility of fooling all the people all the time was a homely tribute to the common intelligence of the mass.

will govern in the interest of society.<sup>48</sup> But there always have been and are still many who deny the soundness of this assumption.<sup>49</sup>

**Elements of Strength of Democratic Government.**—In evaluating the advantages of democracy as a form of government we may disregard the uncritical opinions of those whose faith in the perfection of democracy is an obsession,—almost a religion,—who worship it blindly and deliberately close their eyes to the obvious defects which actual experience has shown it to possess.<sup>50</sup> On the other hand, we need not consider seriously the equally uncritical and sweeping generalizations of men like Talleyrand, who defined democracy as "an aristocracy of blackguards"; of Carlyle, who sneeringly referred to "the people as a certain number of millions, mostly fools"; of H. G. Wells, who asserts that there is no case for the elective democratic government of modern states that cannot be "knocked to pieces in five minutes";<sup>51</sup> of Ludovici, who asserts that democracy leads to death and aristocracy to life;<sup>52</sup> etc. Our judgment should be based on the results of actual experience and as evidence of this upon the studies of scholars who have examined the history and workings of democracy and who have recorded the results of their investigation in scientific treatises.

The test of the strength or weakness of a particular type of government lies partly in its efficiency, that is, in the degree to which

<sup>48</sup> Quoted by Merriam, "American Political Theories," p. 163.

<sup>49</sup> Sidgwick ("Elements of Polities," p. 610) rejects the correctness of this assumption and maintains also with obvious truth that the doctrine of the consent of the governed must be taken with qualifications. See also Seeley (*op. cit.*, p. 327), who asserts that all democracies as a matter of fact apply standards of fitness and that those of a representative type are essentially aristocratic. "I do not know," he says, "in what part of history you could find a state founded on the principle that one man is as good as another."

<sup>50</sup> For example, Bancroft, "History of the United States" (1885), vol. I, pp. 1 ff., and 602 ff. <sup>51</sup> "A Modern Utopia," p. 243.

<sup>52</sup> "Democracy," says Ludovici (*op. cit.*, p. 251), "therefore means death. It means inviting life's adversary to the council board. It means admitting into the deliberations concerning life, one, or rather many, who can be right about life only by a fluke, only by the merest accident, and who could no more be expected to voice the likes and dislikes of healthy permanent life than a kangaroo could be expected to go foraging for pheasants." Compare also the equally severe criticism of Mencken in his "Notes on Democracy" (1926), who asserts that democracy is based on the postulate that all wisdom rests with the inferior four fifths of mankind—with the hewers of wood and the drawers of water:—that the masses of the people are "sheep," that they are bamboozled and exploited by small minorities, etc.

it accomplishes the primary ends for which governments are established ; and partly in the educational, social, and civic effect which it produces upon the body of citizens over whom its authority is exercised. Judged on the basis of its character as a contrivance for doing the things for which governments are established, and doing them in a way which accords with the general will of the people, democratic government, it is claimed, is superior to all other types—in fact it is the only type under which those who exercise public authority can be subjected to the control of those in whose interest they are chosen to govern, and the only one in which their responsibility to the governed can be adequately enforced. The theory is that, being freely chosen by their fellow citizens, ordinarily for short terms, and accountable to them for the manner in which they exercise their trust, those who are called to govern will be the most representative, the most competent, and the most worthy of the public confidence ; whereas in a monarchy or an aristocracy those who govern may be appointed on the bases of widely different considerations. In short, it is claimed that popular election, popular control, and popular responsibility are more likely to insure a greater degree of efficiency than any other system of government.

By no one was the strength of democratic government in its representative form so ably set forth as by John Stuart Mill, who defined it as that form in which "the whole people, or some numerous portion of them, exercise the governing power through deputies periodically elected by themselves." There is no difficulty in showing, he asserted, that the ideally best form of government is that in which the supreme controlling power in the last resort is vested in the entire aggregate of the community, every citizen not only having a voice in the exercise of that ultimate sovereignty, but being at least occasionally called on to take an actual part in the government, by the personal discharge of some public function, local or general.<sup>53</sup> The only government, he continued, which can fully satisfy the exigencies of the social state is one in which the whole people participate, and the degree of participation should everywhere be as great as the general degree of improvement of the community will allow, and ultimately *all* should be admitted to a share in the sovereign power of the state.<sup>54</sup>

<sup>53</sup> "Representative Government," p. 51.

<sup>54</sup> "Representative Government," p. 66.

So far as the welfare of the community is concerned, the superiority of popular government, Mill went on to say, rests upon two principles of as universal truth and applicability as any general proposition which can be laid down respecting human affairs. The first is, that the rights and interests of the individual can be safeguarded only when he is able to "stand up" for them himself; the second is, that the general prosperity attains a higher degree and is more widely diffused in proportion to the amount and variety of the personal energies enlisted in promoting it.<sup>55</sup>

But the greatest glory of democracy in the opinion of its votaries does not flow so much from its own inherent excellence as a form of government, as from its influence in elevating the masses of the people, developing their faculties, stimulating interest among them in public affairs, and strengthening their patriotism by allowing them a share in its administration.<sup>56</sup> "No man is free in the political acceptation of the word," said Laveleye, "if he does not have some share in the government of his country, and he who is governed not by functionaries whom he has helped to choose, but by authorities constituted without his consent, is a subject, not a citizen."<sup>57</sup> Lord Bryce pointed out that the manhood of the individual is dignified by his political enfranchisement and that he is usually raised to a higher level by the sense of duty which it throws upon him.<sup>58</sup> Mill likewise very aptly remarked that a man who has no vote in the government to which he is subject, and no prospect of obtaining one, either will be a malcontent or will feel as one whom the general affairs of society do not concern. For a government in which the masses have no share they do not feel the same readiness to make sacrifices. Democracy strengthens the love of country because the citizens feel that the government is their own

<sup>55</sup> *Ibid.*, p. 52.

<sup>56</sup> Compare Bluntschli, "Allgemeine Staatslehre," bk. VI, ch. 21; also his "Politik," bk. VI, ch. 2; also Pradier-Fodéró, "Principes généraux de droit de politique," etc., p. 240.

<sup>57</sup> "Le Gouvernement dans la démocratie," vol. I, p. 273.

<sup>58</sup> *Op. cit.*, vol. I, p. 150. Other writers emphasize that one of the chief values of democracy consists in the fact that it rests on the idea of the personal freedom of the individual, that it is an expression of the sense of right on which the modern state is founded, and that more than any other form of government it contributes to the development of the all-round man. Compare in this sense Hobhouse, "Democracy and Reaction" and his "Social Evolution and Political Theory"; Hobsbawm, "Imperialism"; and Jordan, "Imperialism."

creation and that magistrates are their servants rather than their masters. The French people, to quote Laveleye again, never began to love France until after the Revolution, when they were admitted to a share in its government, since which time they have adored it.<sup>59</sup> Popular governments, resting as they do on the consent of the governed and upon the principle of equality, are also likely to be more immune from revolutionary disturbances than those in which the people have no right of participation. Thus De Tocqueville remarked that almost all revolutions which have changed the face of the world have had for their purpose the destruction of inequality.

The same author, in his study of democracy in America, dwelt repeatedly upon the interest which the American people took in public affairs, their high state of intelligence in regard to political matters, and their natural patriotism.<sup>60</sup> He pointed out that one of the great advantages of a democracy is that it serves as a sort of training school for citizenship. Mill likewise laid great stress upon the influence of democracy in elevating the character and political intelligence of the masses. The "most important point of excellence," he said, "which any form of government can possess is to promote the virtue and intelligence of the people themselves, and the first consideration in judging of the merits of a particular form of government is how far they tend to foster intellectual and moral qualities in the citizens."<sup>61</sup> The government which does this best, he continued, is likely to be the best in all other respects. Democratic government, more than any other, he thought, produced this result.

**Weaknesses of Democracy.**—Democratic government has always had its critics and even to-day when it has become very nearly universal, they are by no means lacking. In ancient and medieval times its very name connoted the idea of government by the irresponsible multitude. Aristotle classified it as a degenerate or perverted form of constitutional government. Treitschke mentions that in the Rathaus of Augsburg there are three allegorical paintings, one of which represents aristocracy in the guise of a solemn senate, another monarchy as a brooding despot receiving the humble homage of a gorgeous train of followers, and the third, democracy, as a drunken Cleon surrounded

<sup>59</sup> *Op. cit.*, vol. I, p. 274.

<sup>60</sup> See especially, vol. I, pp. 94, 97, 259, 263.

<sup>61</sup> *Op. cit.*, pp. 27, 29.

by a yelling mob.<sup>62</sup> The last-mentioned picture represented, at the time it was made, the current conception of the character of democracy. Critics no longer regard it as so debased, but they attack its foundations on other grounds. In the first place, they assert that it attaches undue importance to quantity rather than quality. It makes the decision of the majority of the mass, even if a very small majority, the law, when the opinion of the minority, by reason of its superior intellectual, moral, and economic capacity, may be the wiser.

It rests upon what is declared to be a false principle, namely that every man, whatever his real worth, is the equal of every other man so far as his capacity to participate in government is concerned, and consequently that no man's vote should count for more than that of another man, in the choice of public officials and the determination of public policies.<sup>63</sup> It either underestimates the value of special training and expert knowledge in the business of government, qualities which are considered essential in the field of private business, or makes it difficult to get experts into the public service. Yet, as the late Mr. Justice James Fitzjames Stephen once remarked, the work of governing a great nation, if really done well, requires an unusual amount of special knowledge and the steady restrained and calm exertion of a great variety of the highest talents which are to be found.<sup>64</sup> Democracy, it is contended, means government, in large measure, by the ignorant, the untrained, and the unfit. It distrusts specialists and is inclined to regard government by them as inconsistent with true democracy.<sup>65</sup>

<sup>62</sup> "Politics," vol. II, p. 229.

<sup>63</sup> Compare as to this Mallock, "The Limits of Pure Democracy," p. 42, and Barthélemy, "Le problème de la compétence dans la démocratie," p. 253.

<sup>64</sup> "Liberty, Fraternity, and Equality," (1873), p. 245.

<sup>65</sup> As to this criticism, see Faguet, "Le culte de l'incompétence" (1912). "Government," he says, "is an art and it presupposes knowledge, but the people are governed by men who have neither knowledge nor art and who are chosen because they have them not" (p. 45). Incompetence, he says, permeates all branches of the French government and especially the judiciary. Professor Barthélemy in his stimulating book, "Le problème de la compétence dans la démocratie" (1918), also points out that the great weakness of democracy is the incompetence of those who govern, the prevalence of *amateurisme* in the public service, and the general belief that every one is fit to govern. Democratic government, he says, of all governments, has need of the most technical skill, yet it exacts the least. In practice it insists upon certain formal qualifications for appointments to the inferior posts but not for the higher ones. The higher the office the fewer are the evidences of capacity required. See especially his introductory chapter.

Mr. A. G. Sedgwick in a critical study of the weakness of American democracy, entitled "The Democratic Mistake" (1912), points out, as other writers have done, that one of its chief defects lies in the lack of adequate means for securing an enforceable responsibility ; that the prevailing belief that responsibility can be obtained by an attempt to make public officials responsible to the community through popular election, short tenures, and rotation in office, has not been justified by the facts ; that, on the contrary, the only effective method of securing real responsibility lies in security of tenure as is the practice in private business. The failure to provide this method, according to him, constitutes the great "democratic mistake."<sup>66</sup> But democracies look with disfavor upon infrequent elections and long tenures because they are popularly believed to be undemocratic. Democracies are further criticized because they distrust natural leaders and are a prolific breeding ground for agitators, flatterers, bosses, and demagogues.<sup>67</sup> Again they are said to be wasteful and extravagant ; they tend to level society down rather than up ; and they are indifferent to, if not actually hostile to, the advancement of education, science, literature, and art.<sup>68</sup>

<sup>66</sup> See especially pp. 90 ff. and 118 ff. Compare the somewhat similar views of the French writer M. Faguet in his "The Dread of Responsibility" (Eng. trans. by E. J. Putnam, 1914), where he criticizes the French democracy for the reason that it is founded on the principle of "universal irresponsibility." The French, he says, have a sort of instinctive fear of responsibility, and to avoid it they have divided it, subdivided it, and dispersed it so that it has ceased to exist. "The sole governing power resides in a confused mass which offers no point to which a man can address himself if he has a complaint, a claim, or an indignant protest to make." See especially Chapter 4. M. Faguet advocates an aristocracy not of wealth or birth but of capacity, an aristocracy composed of that part of the nation which has character and ability.

<sup>67</sup> Compare Treitschke, "Politics," vol. II, p. 290, on the character and baleful influence of demagogues.

<sup>68</sup> This criticism is made by Treitschke. Democracy, Treitschke asserts, has no taste for education beyond the elementary and technical (*ibid.*, II, 323), and we may look in vain to see art and science encouraged by modern democracy. No democracy has ever produced a second Florence (*ibid.*, II, p. 285). See also Bluntschli, "Allgemeine Staatslehre," bk. VI, ch. 23 ; also his "Politik," bk. VI, ch. 2. Bluntschli, however, thinks that democracies are more favorable than other forms of government to public education, charity, etc. The subject is discussed by De Tocqueville in his "Democracy in America," vol. II, bk. I, chs. 9-12. See especially pp. 32, 35, 40, 42, 51, 52, 80, of the English translation by Reeves. See also Maine, "Popular Government," ch. 1 ; and Laveleye, "Le gouvernement dans la démocratie," bk. VI, ch. 7.

**Maine's Estimate of Democracy.**—One of the most vigorous if not well-founded criticisms of democracy made in the nineteenth century was that of the English jurist, Sir Henry Maine, in his "Popular Government" published in 1886. Maine, after a review of the history of popular government, concluded that "it affords little support for the assumption that it has an indefinitely long future before it." Experience, he asserted, rather tends to show that it is a form of government characterized by "great fragility," and that since its appearance in the world "all forms of government have become more insecure than they were before." "Popular governments," he declared, "have been repeatedly overturned by mobs and armies in combination; of all governments they seem least likely to cope successfully with the greatest of all irreconcilables, the nationalists; they imply a breaking up of political power into morsels and the giving to each person an infinitesimally small portion; they rest upon universal suffrage, which is the natural basis of tyranny; they are unfavorable to intellectual progress and the advance of scientific truth; they lack stability; and they are governments by the ignorant and unintelligent." "Of all the forms of government, democracy," he declared, "is by far the most difficult." It is this difficulty that mainly accounts for its "ephemeral duration."<sup>69</sup>

The inherent difficulties of democratic government, he went on to say, are so great and manifold that in large complex modern societies it could neither last nor work if it were not aided by certain forces which are not exclusively associated with it, but of which it greatly stimulates the energy. The prejudices of the people are far stronger than those of the privileged classes; they are far more vulgar and they are far more dangerous because their opinions are apt to run counter to scientific conclusions.<sup>70</sup>

Maine denied that there is any real connection between democracy and liberty, and asserted that in case there is and the choice has to be made between them, it is even better to remain a nation capable of displaying the virtues of a nation than to be free.<sup>71</sup> "By a wise constitution," said Maine, "democracy may be made as calm as the water

<sup>69</sup> Cf. Pradier-Fodéré ("Principes généraux de droit de politique," etc., p. 240), who, while pronouncing democratic government to be the "most rational in principle," declared that it is the "most difficult to apply." <sup>70</sup> *Ibid.*, p. 67.

<sup>71</sup> *Ibid.*, p. 63. Maine expressed the opinion that the government of a bene-

in a great artificial reservoir ; but if there is a weak point anywhere in its structure, the mighty force which it controls will burst through it and spread destruction far and near."<sup>72</sup>

**Lecky's Criticism.**—Another critic of democracy was the English historian Lecky, who in two volumes entitled "Democracy and Liberty" dwelt upon the dangers of government by the "poorest, the most ignorant, the most incapable, who are necessarily the most numerous."<sup>73</sup> The idea of government by such a class reverses, he declared, all the past experience of mankind. "In every field of human enterprise, in all the computations of life, by the inexorable law of nature, superiority lies with the few and not with the many, and success can be obtained by placing the guiding and controlling power mainly in their hands." "Democracy insures neither better government nor greater liberty ; indeed, some of the strongest democratic tendencies are adverse to liberty. On the contrary, strong arguments may be adduced both from history and from the nature of things to show that democracy may often prove the direct opposite of liberty." To place the chief power in the most ignorant classes is to place it in the hands of those who naturally care least for political liberty and who are most likely to follow with an absolute devotion some strong leader. The upper and middle classes have shown the greatest devotion to liberty and have been its most ardent defenders, while democracy has often enough sought to dethrone it.<sup>74</sup> Speaking of the United States, he declared, as De Tocqueville had done before him, that in hardly any other country does the best life and energy of the nation flow so habitually apart from politics, and is the best talent so rarely chosen to the public service.<sup>75</sup> Likewise he adopted the view of De Tocqueville, Laveleye, Bluntschli, Maine, and Treitschke that dem-

volent despot was preferable to that of a democracy. "There is no doubt," he said, "that the Roman emperor cared more for the general good of the vast groups of societies subject to him than the Roman republic had done." "Popular Government," p. 83. Cf. also Laveleye on "The Good Despot," *op. cit.*, bk. V, ch. 7.

<sup>72</sup> *Op. cit.*, p. 111.

<sup>73</sup> For his views on government by the "unthinking and irresponsible multitude," see vol. I, pp. 18-21, where the evils of universal suffrage are dwelt upon. Lecky expressed the opinion that it would be a misfortune if the hereditary element in the British House of Lords were excluded (I, p. 381).

<sup>74</sup> *Ibid.*, pp. 212-215.

<sup>75</sup> *Ibid.*, p. 94; De Tocqueville, *op. cit.*, vol. I, ch. 13.

cacy is unfavorable to the development of the higher forms of intellectual life, such as literature, art, and science; in short, that democracy levels down quite as much as up.<sup>76</sup> Speaking of the alleged equality upon which the American democracy rests, Maine declared that "there has hardly ever been a community in which the weak have been pushed so pitilessly to the wall; in which those who have succeeded have so uniformly been the strong, and in which, in so short a time, there has arisen so great an inequality of private fortune and domestic luxury."<sup>77</sup> Laveleye, in his work entitled "*Le Gouvernement dans la démocratie*," likewise argued that democracy does not necessarily produce equality any more than it produces liberty, and that it is, besides, the enemy of both wealth and culture. Inequality of conditions and the struggle of classes, he declared, were responsible for the fall of the ancient democracies. If the people are ignorant and incapable, democracy must inevitably degenerate into anarchy and despotism, and both equality and liberty will be lost.<sup>78</sup> These criticisms, especially those of Lecky, however, have been answered by various writers who have pointed out that some at least of the defects which they attributed to democracy are not caused by it but rather accompany it, and that democracy is not necessarily government by the ignorant and unfit.<sup>79</sup>

<sup>76</sup> *Ibid.*, pp. 105, 108.

<sup>77</sup> "Popular Government," p. 51. Compare also Stephen ("Liberty, Fraternity, and Equality," p. 239), who remarks that "in a pure democracy the ruling men will be the wire pullers and their friends; but they will be no more on an equality with the people than soldiers or ministers of state are on an equality with the subjects of a monarchy. Under all circumstances the rank and file are directed by leaders of one kind or another, who get the command of their collective force," Lord Brougham ("Works," vol. XI, p. 4) offered the following estimate of democratic government: "The democratic form has some virtues of a high order. The rulers have no sinister interests; personal ambition has no scope; purity is promoted, not merely in the conduct of public men, but in the manners of the people; and the resources of the state are husbanded at all times; while in war they are fully called forth. The defects, however, are equal to the excellences. The supreme power is placed wholly in irresponsible hands, because the holders of it are secure from all personal risk, and beyond the reach of censure; and those whom they choose to exercise it share in their irresponsibility. There is no security for steady and consistent policy, either in foreign or domestic affairs; a risk of entire and violent change attends the administration, and even the constitution; and the peace of the country, as well abroad as at home, is in perpetual and imminent danger."

<sup>78</sup> See especially bk. VI, chs. 5, 6 and 7.

<sup>79</sup> For example, Bascom, "The Alleged Failure of Democracy," *Yale Review*, vol. IX (1900), and Ciddings, "Democracy and Empire," pp. 200 ff.

**Treitschke's Indictment.**—One of the most violent assaults made upon democracy as a form of government during the nineteenth century was that of the German historian Heinrich Treitschke, who was an almost blind worshiper of monarchy, especially the Prussian type, which he pronounced to be an enlightened despotism. His prejudice against American democracy in particular was intense. From the technical standpoint the aristocracy of southern slaveholders prior to the Civil War was, he said, "infinitely superior to the democracy of the North," which he regarded as a corrupt dollar-worshiping plutocracy, or oligarchy of the rich.<sup>80</sup> In fact, he prophesied, the constitution of the United States was already "on a downward path."<sup>81</sup> His estimate of the English, French, and Swiss democracies was hardly less severe. France was in fact "a complete plutocracy, an oligarchy of a few banking houses who avail themselves silently of democratic forms in order to exploit them for their own ends." As to Switzerland, it was "undeniable that Swiss liberty is positively less than in Prussia."<sup>82</sup> The whole conception of democracy, resting as it does upon the principle of equality and the rule of the majority, is false, he said; it tends to exploit the rich for the benefit of the poor; it is fickle, incompetent, discourages brilliancy of intellect, fertilizes the soil for demagogues, and does little for the promotion of culture and the higher spiritual things of life.<sup>83</sup>

In view of Treitschke's violent prejudices and his amazing ignor-

<sup>80</sup> "Politics," vol. II, p. 271.

<sup>81</sup> *Ibid.*, 291.

<sup>82</sup> *Ibid.*, 275.

<sup>83</sup> See *ibid.*, especially ch. 20, for his indictment of democracy. Most German writers on political science prior to the World War regarded democracy with skepticism. Hasbach in his "Die moderne Demokratie" (1912)—the most notable contribution to the history and workings of democracy by a German—expressed a distinctly unfavorable opinion of democracy. After an examination of the forms and history of democratic government in the various countries where it has been tried, he concludes: "The picture of the democratic state portrayed in the foregoing pages will convince no one who compares it with constitutional monarchy that it is superior. Montesquieu's judgment that by its very nature democracy is not a free form of political organization is as true to-day as it was 160 years ago, although it has since that time posed as the defender of freedom." See also the criticism of democracy by a group of German scholars in a volume entitled "Modern Germany," published in 1915 as a defense of German political institutions and policies. The gist of their indictment is that democratic government means class rule, political corruption, and changeability of policy.

ance of the history and experience of the democracies which he criticized, his opinions are entitled to little weight.

**Other Recent Critics.**—Among the more recent and more moderate critics of democracy may be mentioned the English scholar W. H. Mallock, who in his "The Limits of Pure Democracy" (3d ed., 1918) made a searching examination of the premises upon which modern democracy rests, and pointed out that in so far as it assumes equality of influence among all men, democracy does not and never has existed ; Professor Ernest Barker, who asserts that the cost of democratic government in loss of efficiency is enormous, and when "all is said and done, it means the rule of the few manipulators who can collect suffrages in their own favor with the greatest success";<sup>84</sup> the French writer Lebon, who maintains that popular government is too much swayed by emotionalism and tends to become government by crowds;<sup>85</sup> Walter E. Weyl, who apparently considers the American democracy to be a corrupt plutocracy ;<sup>86</sup> and Professor Giddings, who sees two dangers in democracy : first, an "unbridled emotionalism" which finds its graver manifestations in the violence of mobs and revolutions, which upholds the "absolutism of the multitude and tramples on all rights of minorities" ; and second, the decay of national character.<sup>87</sup> Some writers who are attached to the democratic ideal advocate various changes in the system as it actually exists.<sup>88</sup>

Whatever the merits of these criticisms, another should be now added, one which applies with peculiar force to American democracy, namely, the evil effects of the lavish expenditure of money in elections. As is well known, the sums which are expended directly and indirectly during every presidential campaign to promote the nomination and election of particular candidates amount to many millions of dollars, and the investigation by a committee of the Senate in 1926 of expenditures by or on behalf of certain candidates for the upper house of

<sup>84</sup> "Political Thought in England from Spencer to the Present Day," p. 172.

<sup>85</sup> See among others his book "The Crowd."

<sup>86</sup> "The New Democracy" (1914), especially ch. 7.

<sup>87</sup> "Democracy and Empire," p. 239.

<sup>88</sup> For example Follett ("The New State," 1918), Lippman ("Public Opinion," 1922), Croly ("Progressive Democracy," 1915), Howe ("Revolution and Democracy"), Wallas ("The Great Society," 1904), and Bentley ("The Process of Government," 1908).

Congress revealed the fact that in some cases the amount expended by or for a single candidate in order to obtain a nomination approximated a half million dollars. Even assuming that all such expenditures are entirely honest and legitimate, such a practice is incompatible with the spirit of true democracy, one of whose tenets is that the public offices should be open equally to all who possess the qualifications required by law. Surely a democracy in which money plays so great a rôle, where ambitious candidates with large fortunes have an enormous advantage over their less favored but perhaps more deserving and better-qualified competitors, is unlike what the founders believed they were establishing, and in conflict with the better ideals of those to-day whose faith in its future still abides. It is probably true — and it has often been a matter of reproach — that it costs more in time and money to give effect to the processes of democracy in the United States than in any other country of the world.<sup>89</sup>

**Lord Bryce's Estimate.**—The latest, and by far the most comprehensive and valuable study of the actual workings of democracy, is the recent work of the late Lord Bryce in two volumes, entitled "Modern Democracies," published in 1921. Based both on wide reading and on personal observation, and being the work of an illustrious scholar whose sympathies were, on the whole, on the side of democracy, his conclusions are entitled to great weight. He examined in turn the elements of strength and weakness of democracy in general and of the more important existing democratic states in particular. His study is characterized by keen insight, profound analysis, and a sympathetic point of view. In all the literature of democracy there is no analysis and evaluation which is fairer or freer of manifest prejudice or preconceived opinions. In a general review of American democracy he enumerated the defects which have revealed themselves in the workings of popular government in the United States. Among the more important of these are : the decline of popular confidence in the state legislatures and to a less degree in the national Congress ; the inferiority of the judiciary "in the large majority" of the states ; the slow, uncertain, and often ineffective administration of criminal justice ; the imperfect enforcement of the laws ; the incompetent, wasteful, and

<sup>89</sup> Compare as to this strictures of Hasbach, "Die moderne Demokratie," p. 597.

corrupt government of the cities ; the increasing tendency of party organizations, controlled as they are by professional politicians, to become selfish and oligarchic ; the "formidable" influence of wealth, and especially of corporate wealth, upon the legislatures and even upon the courts ; and the increasing failure of the public service to attract men of brilliant gifts, this too in a country where talent abounds.<sup>90</sup> He pointed out, however, that certain of these defects are due to causes that are not political or which are not inherent in democracy as such, and which may exist and have existed in governments which are not democratic. Summing up the chief faults observed in all the six democracies with which his study deals, he says they may be described as : (a) the influence of money in perverting legislation and administration ; (b) the tendency to make politics a trade or profession ; (c) extravagance in administration ; (d) the distortion of the doctrine of equality and the failure to appreciate the value of administrative skill ; (e) the undue power of party organizations ; and (f) the tendency of legislators and public officials to bargain for votes in the passing of laws and in tolerating breaches of order. But of these faults, the first three, as he pointed out, are found in all governments, whether democracies or otherwise ; and while the last three are most often found in democracies they are not an inseparable feature of democracy. He admitted that democracy has opened some new channels "in which the familiar propensities to evil can flow, but it has stopped some of the old channels, and has not increased the volume of the stream." Two dangers, he thought, threaten all democracies. One lies in the self-interest of those who get control of the machinery of government and turn it to ignoble ends ; the other is the irresponsible power wielded by those who supply the people with the materials they need for judging men and measures—the dissemination by demagogues, through the press, of untruths, fallacies, and incentives to violence.<sup>91</sup>

The argument that democracy tends to repress individuality and originality, and to level society down to the average, and that it is un-

<sup>90</sup> Vol. II, pp. 154-155. Already in his earlier work "The American Commonwealth" (I, 483), Bryce had expressed the opinion that one weakness of democracy everywhere is that it underestimates the difficulty of government and overestimates the capacity of the common man.

<sup>91</sup> *Ibid.*, pp. 458-460. A good summary of Lord Bryce's estimate of democracy will be found in an article by Professor Becker entitled "Lord Bryce on Modern Democracies," *Pol. Sci. Quar.*, vol. XXXVI, pp. 663 ff. (1921).

favorable to the development of science, education, art, literature, and culture generally, Bryce thought was based not upon facts but upon conjectures as to what might happen under certain political conditions which were assumed for the purposes of the argument to be the only conditions worth regarding. There is nothing to show, he said, that democracy has either fostered intellectual progress as the early liberals contended that it would, or that it has, on the other hand, discouraged or retarded it. The truth is, letters, arts, and science have flourished under all forms of government, monarchies, aristocracies, and democracies alike. The movements of intellectual and moral forces are so subtle and intricate that any explanation drawn from a few external facts is sure to be defective and likely to be misleading.<sup>92</sup>

**The Future of Democracy.**—Whatever may be the weaknesses of democracy, and they undoubtedly exist, it seems destined to become universal. In fact it has already nearly become such. Since the close of the World War we have seen even the rock-ribbed autocracy of Germany transformed into a republic with all the modern democratic institutions such as universal suffrage without distinction of sex, popular election of the head of the state, parliamentary ministerial responsibility, proportional representation, the referendum, the initiative, and the recall. Old monarchies such as Belgium, Rumania, and Hungary have introduced new democratic institutions. It is hardly likely that they will ever again turn away from democracy, for the reason, as Laski remarks, that men who have once tasted power will not surrender it.<sup>93</sup> Whether, as Sidgwick remarked, democracy is "a depressingly prevalent political fact," it is, as he himself admitted, "a widely and enthusiastically accepted political ideal."<sup>94</sup> Recently Russia, Italy, Austria, and Germany have abandoned it, but it is doubtful whether their abandonment will be permanent. Sir Henry Maine, who ventured the opinion that the history of popular government did not warrant the assumption that it had an indefinite future, admitted that the example of the United States had done much to raise the

<sup>92</sup> *Ibid.*, pp. 519-526.

<sup>93</sup> "Grammar of Politics," p. 17. Stephen (*op. cit.*, p. 24?), more than half a century ago, felt obliged to say that "the waters are out and no human force can turn them back," "but," he added, "I do not see why as we go with the stream, we need sing Hallelujah to the river god."

<sup>94</sup> "Elements of Politics," p. 608.

credit of democratic republics and to reveal their possibilities. Lecky, who, like Maine, feared and distrusted democracy, also admitted that it was "likely to dominate, at least for a considerable time, in all civilized countries," and that the only questions to be met were those relating to the form which it should take and the means by which its characteristic evils could be best avoided.

We are free to criticize democracy as much as we please, but as Barthélemy remarks, it is as vain as to criticize the course of the seasons or the laws of attraction of the stars. Democracy will reply *sum quia sum*.<sup>95</sup>

It is not improbable, however, that the forms of democracy as it exists in some countries will undergo important changes. There are those who maintain that the remedy for the existing ills is not less but more democracy, and that consequently the changes that are likely to follow will involve a further extension of the democratic principle. On the other hand, an increasing number of wise observers believe that democracy has been perverted through an attempt to throw upon the people tasks for which they are incompetent and that a reaction is inevitable. Lord Bryce was certainly not over optimistic regarding the future of democracy. In the form which it has almost everywhere taken, that of government by a representative assembly, he thought it shows signs of decay; in nearly every country the confidence in such assemblies has perceptibly declined; in some they have shown themselves unequal to their tasks, and in others too subservient to parties.<sup>96</sup> The recent virtual displacement of representative government in a number of European countries by dictatorships has been due in part to the dissatisfaction with the representative system. Nevertheless it is, as Bryce aptly remarked, up to those who criticize democracy to suggest something better to take its place.

**Essential Conditions of Successful Democracy.**—In the light of a varied and wide experience with democracy we are fully justified in concluding that there are certain conditions which are essential to the successful working of democratic government. Maine, who was a severe critic of democracy, admitted that with a "wise constitution" the turbulence of democracy might be restrained and made as "calm

<sup>95</sup> "Le problème de la compétence," p. 251.

<sup>96</sup> *Op. cit.*, vol. II, p. 576.

as water in a reservoir." Lecky, who likewise criticized American democracy, admitted that it was not a failure. But, he added, one duty is absolutely essential to the safe working of democracy anywhere, namely, "a written constitution, securing property and contract, placing difficulties in the way of organic changes, restricting the power of majorities, and preventing outbursts of mere temporary discontent and more casual coalitions from overthrowing the main pillars of state."<sup>97</sup>

It is hardly necessary to say that perhaps the most fundamental of all conditions to the successful working of democratic government is that the people who work it shall possess a relatively high degree of political intelligence, an abiding interest in public affairs, a keen sense of public responsibility, and a readiness to accept and abide by the decisions of the majority. The majority in turn must be willing to recognize that strong minorities have rights which are entitled to respect and cannot be disregarded without violating one of the fundamental principles of popular government. The distressing indifference of the electors in many countries is undoubtedly a danger to democracy. It was a wise saying of Montesquieu that the tyranny of a prince would hardly bring a state to ruin quicker than would indifference to the common welfare in a republic. Laveleye and Mill very properly maintained that democracies should provide at the expense of the state the facilities for elementary education and that it should even be made obligatory.<sup>98</sup> Happily many of them are to-day fulfilling this duty in a high degree.

Lord Bryce justly concluded that popular government will flourish and decline in proportion to the moral and intellectual progress of mankind. It assumes, he said, not merely intelligence derived from books—mere ability to read and write—but an intelligence "elevated by honor, purified by sympathy, and stimulated by a sense of duty to the community." In short, the future of democracy is a part of two larger branches of inquiry : the future of religion and the prospects of human progress.<sup>99</sup> Professor Barthélémy, who has written a pen-

<sup>97</sup> *Op. cit.*, vol. I, p. 112.

<sup>98</sup> Laveleye, *op. cit.*, p. 328; Mill, *op. cit.*, p. 68. As to the kind of instruction most necessary in a democracy see the views of Giddings, *op. cit.*, bk. XIV.

<sup>99</sup> *Op. cit.*, vol. I, p. 71, vol. II, p. 60. Mill also emphasized the necessity of interest, sympathy, and the sense of public responsibility as essential conditions, *op. cit.*, ch. 4.

trating study of the subject, concludes that the essential condition of success is that democracy shall be "directed by the wisest, the most intelligent and the best, in a word, although it excites prejudice, by the *élite* of the population."<sup>100</sup>

#### Varying Aptitudes of People for Democratic Government.—

The results of experience undoubtedly prove that the success of democratic government must vary with the aptitude of peoples who operate it, because, as Mill observed, governments are human instruments and must be worked by men. Certainly there are not lacking countries in which it has been introduced where the results have been disappointing. Thus in most of the Latin American republics the form at least of democracy exists, but in some of them the actual working of the system has not been characterized by a high degree of success, due to the general lack among the people of certain of the essential qualities and aptitudes referred to above, such as are found in a more conspicuous degree among Anglo-Saxon peoples.<sup>101</sup> There dictatorships and revolutions are still common in the place of orderly stable government. Garcia Calderon, an eminent Peruvian scholar and publicist, confesses that democracy has failed in a large part of Latin America.

<sup>100</sup> "Le problème de la compétence," p. 36. Norman Angell in a brilliant essay in his recent book "The Public Mind" (1927), ch. 1, has given a keen analysis and penetrating criticism of democracy. Discussing the question whether democracy is possible at all, he concludes that if it means broadly "government by majority" it can never be more than a sham, considering the deep prejudices, national animosities, religious fanaticisms, and wide-spread emotions which determine the opinions of the masses. Nevertheless it can, he says, be made a success by frankly recognizing its weaknesses and by endeavouring to steer clear of them by recognizing freely the truth that "the voice of the people is usually the voice of Satan," that the natural tendencies of popular judgment are extremely unreliable and faulty, that we can by proper social disciplines and educational processes—things which are not "natural" at all but highly "artificial"—correct and guide the natural tendencies, if we will only recognize the necessity of so doing. To go on saying that the voice of the people is the voice of God with the implication that the people are "naturally" right, is to be as guilty as the navigator who should say "there are no reefs in the ocean that I need bother about." From that moment the reefs become a deadly danger to the ship. The navigator who says "why of course there are reefs : I have them marked on my chart and I know how to avoid them" has robbed those traps of nearly all their danger. Mr. Angell frankly admits that there is no alternative to democracy ; autocracy, aristocracy, dictatorship, all have the same faults as democracy.

<sup>101</sup> Compare as to this Bryce, *op. cit.*, vol. I, ch. 17, and Hall, "Popular Government," ch. 2.

"A hundred years," he says, "have passed and still the same uneasiness disturbs these states, which fate seems to have condemned to anarchy." "There is little political training, or indeed elementary education of any kind, in Latin America. The illiterate populace, except in some of the large cities, take no share in public life, but instead (in Mexico this is true of two thirds of the people) obey submissively the instructions of a few leaders. A middle class develops very slowly. The agrarian rule of feudal times is still in force on the Argentine *estancias*, Brazilian *fazendas*, and the *haciendas* of other countries. Primitive industry and trade become a foreign monopoly. Everywhere there is a lack of equilibrium between social organization and the pretensions of political documents—on the one hand oligarchy, on the other a theoretically absolute democracy and equality."<sup>102</sup> For similar reasons some have expressed doubt as to the suitability of democracy to the Asiatic races, at least in the present state of their development. In those countries where it has proved most successful it has been a natural growth; if suddenly introduced into countries which have for centuries been despotically governed, it would necessarily be an artificial creation and would take root slowly and with difficulty.<sup>103</sup>

In China, Persia, and Turkey attempts have recently been made to introduce certain democratic institutions, notably the system of responsible parliamentary government, but it has involved the planting of foreign institutions in soil which had not been prepared for them by education in political matters and training in the habits of self-government. Whether the results will justify the high expectations of those who are responsible for the experiment remains to be seen.<sup>104</sup> Lately the forms of democratic government have been introduced in most of the states of eastern and southeastern Europe, there too in soil

<sup>102</sup> "Dictatorship and Democracy in Latin America," *Foreign Affairs*, vol. III (Apr. 1925), p. 474. <sup>103</sup> Compare Bryce, *op. cit.*, vol. II, ch. 71.

<sup>104</sup> Lord Bryce expressed the opinion that the prospects for popular government in Persia and Mexico were dark and that a monarchy was probably more suitable for China than a republic because of the traditional habit of obedience to a sacred autocrat and of the veneration paid to him. "You cannot build upon shifting sands nor effect by a single sudden stroke what in other countries it has taken centuries of struggle and training to accomplish." To devolve upon a people who are not fitted for the undertaking, the task of governing themselves, is like delivering up an ocean steamer to be navigated by cabin boys through the fog and icebergs of the Atlantic, or setting a child to drive a motor car. *Ibid.*, vol. II, pp. 502, 511, 516.

which had not been well prepared and among peoples who certainly lack some of the qualities and habitudes which are essential to the successful working of true democratic government. For a time, at any rate, it may be confidently expected that the operation of this form of government will be attended with difficulty and perhaps breakdowns, which may, however, only be temporary.

**Excessive Burdens of Democracy.**—What some writers regard as a defect, if not a danger, of modern democracies, is their tendency to go to extremes and to devolve upon the electorate tasks which by reason of their character and multiplicity the people are not competent to discharge satisfactorily through direct action. Thus President Lowell has remarked that the trouble with modern democracies is that they attempt to do too much. This criticism, it is believed, is entirely justified, especially in so far as it applies to democracy in the United States.

Those who make this charge claim that the introduction of the referendum, the initiative, and other ultra-democratic devices which throw upon the electorate the burden of decisions and responsibilities which can be better discharged by their representatives, is in fact a perversion of true democracy and its displacement by a false and spurious type.<sup>103</sup> The amount of truth in this somewhat severe judgment would seem to depend upon the extent to which a perfectly sound democratic principle is applied in practice; whether these devices are used properly or are overworked. Where, as has actually happened in some American states, the electorate is called upon to pass judgment upon nearly fifty legislative proposals at a single election, many partisans of a moderate use of the referendum feel that this is pushing democracy to unreasonable limits.

A criticism of American democracy which finds an increasing number of sympathizers, is the practice of choosing by popular vote administrative, ministerial and even technical functionaries—and some would add judges of the courts—and these generally for short terms. This means not only inordinately lengthy and confusing ballots, but a multiplicity of recurring elections, which imposes upon the citizen a

<sup>103</sup> Compare Nichols Murray Butler, "True and False Democracy" (1907), ch. 1, and "Why Should We Change Our Form of Government?" (1912), ch. 1. See also Taft, "Popular Government" (1913), chs. 2-4, and Root, "Experiments in Government" (1913).

burden the like of which is unknown in the most democratic countries of Europe.<sup>106</sup> This feature of democratic government in fact distinguishes the American type from that of all other countries, even that of Switzerland, which is commonly regarded as the classic land of democracy. In the most democratic states of Europe—Great Britain, France, and Switzerland—only members of legislative bodies and local deliberative councils are popularly elected—almost never an administrative functionary or judicial magistrate. In principle it is the same in Canada, where such officers as judges, prosecuting attorneys, sheriffs, and clerks are appointed rather than elected. The original assumption that popular election is an essential condition of responsibility has hardly justified itself.<sup>107</sup> On the contrary it has tended to transfer the actual selection of the incumbents of such offices to political bosses and party machines, and according to some writers has resulted not in popular government but in what has been described as a system of "unpopular" government.<sup>108</sup> True democracy undoubtedly requires the election by the people of their legislative representatives and such executive officers as are charged with the determination of questions of policy, but it can hardly be said that it requires popular election of any others.<sup>109</sup>

The agitation since the World War for popular control of foreign affairs represents the latest and one of the most extreme demands for the extension of democracy into a new field. If the extension is made, the task of democracy will be still more increased and its operation subject to a severer strain. However competent the people may be to pass intelligent judgments upon the character of candidates for public

<sup>106</sup> See Beard, "The Ballot's Burden," *Political Science Quarterly*, vol. XXIV.

<sup>107</sup> See Sedgwick, "The Democratic Mistake," ch. 2, and Bryce, *op. cit.*, vol. II, pp. 135, 161.

<sup>108</sup> Kales, "Unpopular Government in the United States," and Willoughby and Rogers, "Introduction to the Problem of Government," p. 136.

<sup>109</sup> Compare Ford, "Too Much Election" in his "Representative Government," ch. 9. This author goes to the length of asserting that "it is an essential condition of representative government that elections shall be wholly confined to the choice of representatives; that every deviation from that principle is an impairment of representative government, and that if the practice of filling administrative posts by popular election becomes at all general, representative government perishes even if the form of it remains" (p. 253). See also the observations of Professor A. B. Hall ("Popular Government," ch. 3), on the limitations of democracy in so far as it involves the determination by the people of public policies involving technical and scientific knowledge and skill.

office and upon questions of domestic policy, the number who are capable of judging questions of foreign policy, even in the most highly civilized countries, is relatively small. In the United States especially, the lack of popular interest in foreign affairs and consequently the ignorance of the mass in regard to questions of an international character, have been the subject of frequent comment.<sup>110</sup> Under these circumstances, democratic control of foreign policy, if it is to include popular votes on treaties and the settlement of issues of foreign policy in political campaigns, may lead to disastrous results. As Elihu Root has well remarked, if democratic control of foreign policies is ever practicable, the people must fit themselves for the task by interest and education or they will make a worse job of it than the diplomats, against whose alleged faults and incompetency the movement for popular control is directed.<sup>111</sup>

<sup>110</sup> Since the World War, however, there has been a notable increase of popular interest in international affairs, and the number of persons who are fairly well informed upon questions of foreign affairs has greatly increased, though still a small proportion of the whole electorate.

<sup>111</sup> Compare also Barthélémy ("Le problème de la compétence dans la démocratie," pp. 26-27), who emphasizes the unsuitability of the masses of the people for the direct control of foreign affairs, especially if it involves control through referendary votes on treaties or issues of foreign policy. This is due in part to the general lack of information regarding questions of foreign policy and in part to the lack of popular interest in such matters. He points out that not even the authors of the French constitution of 1793, which introduced the most extreme system of democracy ever known, went to the length of providing for popular ratification of treaties, and that no one could be found to-day who would contend that all laws and policies—the budget for example—should be submitted to a referendary vote.

But Switzerland has taken a step in the direction of democratic control of foreign affairs. By a recent amendment to the Swiss constitution provision is made for a popular referendum, upon demand of 30,000 citizens or 8 cantons, upon treaties concluded for an indeterminate period or for a period of more than 15 years. In pursuance of this provision a treaty of Aug. 7, 1921, between France and Switzerland was submitted to the voters and rejected. The question of Switzerland's becoming a member of the League of Nations, also, was determined by a popular vote.

## CHAPTER XVI

### ELEMENTS OF STRENGTH AND WEAKNESS IN DIFFERENT FORMS AND TYPES OF GOVERNMENT (*Continued*)

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#### IV. UNITARY AND CENTRALIZED GOVERNMENT

**Unitary and Centralized Government Explained.**—As stated in a previous chapter, unitary government is that form in which the

supreme governing authority of a state is concentrated in a single organ or set of organs, established at and operating from a common center. For this reason it is sometimes described as centralized government, although the two things are not necessarily identical. In a sense, all non-federal systems of government belong to this class, but even federal governments are centralized in so far as the central government is charged with legislating for the whole country and with the administration of the particular matters committed to its care.

The feature which distinguishes unitary government from federal government is that in the former the ultimate authority and control over all affairs of government and administration rests with the central government, whereas in the latter this authority and control are divided between the central government and a number of local governments. The essence of unitary government, therefore, is the absence of local self-government, except such as the central government itself may concede—which, once conceded, it may restrict or withdraw at will.

**Deconcentration and Decentralization.**—As stated above, unitary government is not necessarily at the same time centralized government, although it is always such in large part. In France, for example, where the system of government is unitary in the sense that all final governing authority centers in and radiates from the central government at Paris, the effect has been attenuated by a process of deconcentration and to some extent also by a process of decentralization. Through the process of deconcentration the active administration of many affairs has been shifted from the central government at Paris to its representatives and agents in the departments, arrondissements, and communes (the prefects, sub-prefects, mayors, commissioners of police, etc.). The effect has thus been to relieve the congestion at Paris and to facilitate the work of administration throughout the local areas. But all such officials and agents (except the mayors) are appointed by the central government at Paris and are (including even the mayors when acting as agents of the central government) controlled and directed from Paris. To this extent the government of France is centralized. Through the process of decentralization a limited degree of local self-government has been granted. Thus, by act of parliament, popularly elected councils have been established in the departments, arrondissements, and communes, and each communal

council chooses a mayor.<sup>1</sup> The powers of the local authorities, however, are much restricted and they are subject to a large degree of central administrative control (*la tutelle administrative*). Such local autonomy as has been granted may at any time be further restricted or totally withdrawn by the parliament which granted it. It thus happens that the government of France, so far as the ultimate source of legislative and administrative authority is concerned, is completely centralized and so far as the actual administration is concerned it is largely so. With varying differences of degree, the governments of other European countries, except the few that are federal in form, are of the same type.<sup>2</sup>

**Elements of Strength.**—Naturally a form of government so widely distributed must, at least in the opinions of the people who have deliberately established it, and who are content to live under it, possess elements of strength which are superior to those of the federal form. These elements are mainly such as result from uniformity of law, policy, and administration throughout the whole country, and from the strength, internal and external, which naturally inheres in a unified system of government. Where the authority to legislate and administer is divided and distributed between a central government and various local governments, the latter of which are constitutionally supreme within their own spheres and subject to little or no central control, there are necessarily a certain weakening of national power, diversity of law and policy in different parts of the country, sometimes inefficient enforcement of law (varying with local standards), and perhaps also wasteful and extravagant local government. In the fields of foreign policy and national defense the strength of centralized government is especially manifest. Unitary government also possesses the merit of being more simple in organization and, it is claimed, less expensive than federal government, because of the lack of duplication of central and local authorities and services.<sup>3</sup>

<sup>1</sup> Until 1882 mayors were appointed by the central government at Paris.

<sup>2</sup> In Great Britain, where a system of centralized government exists, the effect has been increasingly attenuated by the processes of deconcentration and decentralization. There has been much agitation in recent years in favor of a further extension of the process through what the English call "devolution," that is, the creation of subordinate legislatures for England, Scotland, and Wales. On the whole subject, see Chiao, "Devolution in Great Britain" (1926).

<sup>3</sup> This latter statement, however, is not true of some federal systems such as

**Elements of Weakness : the French System as an Illustration.**—The obvious objection to such a system is that it means the absence of the right of local self-government and leaves to distant authorities the determination of policies and the regulation of affairs which may in fact be of no concern to any except the people of the particular localities affected. The effect of such a system is conspicuously revealed in France, where the national parliament at Paris legislates upon purely local affairs and where the central administrative authorities exercise a wide power of control and tutelage over the local councils and administrative authorities. In consequence of the burden thus placed upon the national parliament and upon the central administrative authorities, the local authorities are frequently compelled to wait for long periods of time before obtaining the necessary authority to act, during which period local interests suffer from neglect. The parliament, in addition to being overburdened with the task of legislation, local and national, often lacks the necessary knowledge of local conditions and needs upon which it is called to legislate. It is the same with the central administrative authorities. The result is, local affairs are, or may be, regulated by authorities who know least about them, while the local authorities, who are better qualified by reason of their familiarity and interest, are powerless to act, or at least to act without authority from Paris or the departmental prefectures. Many French writers, even, have criticized the centralized régime under which they live as monarchial (for the most part it goes back to Napoleon), inconsistent with the principles upon which the republic was founded, no longer necessary (as it may have been for a time after the Revolution), and destructive of local liberties. From time to time ministries have declared themselves in favor of a thorough-going modification of the existing system and the substitution of a system of larger local self-government, but as yet little in this direction has been accomplished and the French continue to live under a régime which in its fundamental principles is that which Napoleon imposed upon them in the year 1800.<sup>4</sup>

those of Germany and Austria, where the execution of national laws and the performance of national services devolve largely upon the local governments, so that there is only a limited duplication of governmental machinery.

<sup>4</sup> 346 of the 597 deputies elected to parliament in 1910 had made reform of the administrative system a part of their "professions of faith." The late Paul

Of unitary government, wherever found, it may be said in criticism that it tends to repress local initiative, discourages rather than stimulates interest in public affairs, impairs the vitality of the local governments, and facilitates the development of a centralized bureaucracy. Well enough adapted to a small country having a homogenous population and especially a population among whom the habits and capacity for local self-government are not highly developed, it is unsuited to a country of vast extent, where there is a wide variety of local conditions and a diversity of standards and conceptions. And among a people who are animated by an attachment for local self-government and a love of local liberty, it is intolerable and impossible of long duration.

## V. FEDERAL GOVERNMENT

**Characteristic Features.**—The system of federal government represents the antithesis of the system described above. Its characteristic feature consists in the fact that the power of legislation, government, and administration of the state, instead of being concentrated in a single set of central organs at the capital or in their local representatives and agents, is divided and distributed between the central authorities on the one hand and the authorities of the component units of the federal union on the other. As stated in a previous chapter, the division and distribution are made by the constitution or by the organic legislative act by which the federation was formed, so that the autonomy conceded to, or reserved by, the component states is guaranteed and cannot therefore be restricted or withdrawn at the will of the central government. Generally, within the sphere thus

Deschanel in several books maintained that in consequence of the existing centralized system France is not a democracy but a bureaucracy. See his "L'organisation de la démocratie," p. 121, and his "La décentralisation," p. 11. To the same effect see Barthélémy in the reports of the *Premier congrès Int. des sciences administratives* (1910), vol. I, sec. 1, and his article on "Le mouvement de décentralisation" in the *Rev. du droit pub. et de la science politique*, vol. XXVI, p. 131 ff.; Avenel, "La décentralisation"; Autesserre, "La centralisation administrative," and various books by M. Chardon (Councillor of State), notably his "Les travaux publics" (2d ed., 1904).

In an article entitled "Administrative Reform in France" (*Amer. Pol. Sci. Review*, vol. XII, 1919, pp. 17 ff.), I have discussed the French system and cited an extensive literature relating to the subject.

left to the individual states, they are supreme and are subject to little or no control by the central government.<sup>5</sup> Within this sphere they are free to legislate, govern, and administer in accordance with their own conceptions of their local needs and interests. The federal system, therefore, represents a combination of centralized and local government : it is centralized as regards all such matters of legislation and administration as have been committed to the care of the national authorities ; it is local as regards all other matters.

**Elements of Strength.**—Like all other systems, federal government has its elements of strength and weakness. Its strong points are, in the main, those which are regarded as the defects of unitary government. In the first place, more than any other form of political organization, it affords the means by which petty states may unite themselves into a more powerful commonwealth and thereby obtain the manifest advantages, internal and external, which flow from union, without at the same time wholly surrendering their separate existences and sacrificing their right to govern themselves in respect to matters which concern them alone. It thus combines the advantages of national unity with those of local autonomy and the right of self-government. In return for this advantage the people are reconciled to the loss of power which they sustain through the delegation to the central government of the authority to regulate certain affairs of general interest to all the states composing the union. It furnishes the means of maintaining an equilibrium between the centrifugal and centripetal forces in a state of widely different tendencies. It is the only political system which makes it possible to have uniformity of legislation, policy, and administration throughout the entire country, in respect to those matters concerning which uniformity is desirable, and at the same time makes possible diversity where diversity is desirable by reason of the varying conditions and standards which prevail in different parts of the country. Under such a system experiments in government and legislation may be tried out which would not be possible in a state having the unitary system. It is therefore particularly adapted to states of vast area and diversity of conditions and even to small states whose populations are separated by geographical, racial, or other barriers, and who can be reconciled to live under

<sup>5</sup> The federal systems of Germany, Austria, and to some extent Switzerland constitute exceptions to this statement.

a common régime only when they are permitted a certain degree of autonomy. By permitting to the inhabitants of each component state a large measure of self-government their interest in public affairs is stimulated; they are better qualified for determining their own policies and regulating their own local affairs than uninformed, overburdened, distantly removed bureaucrats are; and in consequence of the division of competence, the central authorities—legislative and administrative—are relieved of the burdens and congestion which oppress them where the unitary system prevails. Lord Bryce also pointed out that under the federal system there is less danger from the rise of a despotic centralized government, usurping the rights of the people.<sup>6</sup>

The advantages of federal government have been frequently emphasized by political writers from Montesquieu to the present day.<sup>7</sup> John Fiske declared it to be the only kind of government which, according to modern ideas, is permanently applicable to a whole continent.<sup>8</sup> Sidgwick, an English writer, predicted that we should see an extension of it even in western Europe, where the example of America would be followed.<sup>9</sup> The German writer Brie, who made an elaborate study of federal government, declared that it represents the highest realization of the state idea,<sup>10</sup> while Westerkamp dwells upon its excellences and points out that it has spread until it embraces a portion of the globe equal to three times the territorial area of Europe.<sup>11</sup>

**Weakness of Federal Government.**—The federal system of government, however, like other forms, has its defects. Some of these are inherent in the very nature of the system, while others are peculiar to the particular forms which have been adopted by different states. In recent years there has been an increasing disposition among writers to dwell upon its defects and to emphasize less its elements of strength,

<sup>6</sup> As to Bryce's views on the merits of federal government, see his "American Commonwealth," chs. 29, 30.

<sup>7</sup> "It is very probable," said Montesquieu, "that mankind would have been at length obliged to live continuously under the government of a single person had they not contrived a kind of constitution that has all the advantages of a republican together with the external forces of a monarchical government; I mean a confederate republic." "Esprit des lois," bk. IX, ch. 1.

<sup>8</sup> "American Political Ideas," p. 92.

<sup>9</sup> "Development of European Polity," p. 439.

<sup>10</sup> "Theorie der Staatenverbindungen," p. 135.

<sup>11</sup> "Staatenbund und Bundesstaat," p. 6.

for the reason that with the growing complexity of modern society its defects have more and more revealed themselves in a striking degree. As one writer has recently said : "Federal government has very decided limitations, serious faults of structure, unheeded perhaps at the time of its inception, but likely to break down under the altering strain of a new environment. Politically and on its external side it has proved itself strong, but economically and in its internal aspect it is proving itself weak."<sup>12</sup>

First of all, in the conduct of foreign affairs federal government possesses an inherent weakness not found in unitary government. The experience of the United States in particular has shown that the individual members of the federal union, by virtue of their reserved powers over the rights of person and property, may embarrass the national government in enforcing its treaty obligations in respect to aliens residing in the United States.<sup>13</sup>

In the domain of internal affairs federal government has also shown itself to be weak for the reason that it means a division of power between coördinate authorities in legislation and administration, and division of power usually means weakness, whatever may be the other advantages which it secures. It means, or may mean, diversity of legislation in respect to matters concerning which the general interests of the country require uniformity of legislation. Thus in the United States we find instead of a single body of uniform law upon such matters as crime, marriage, divorce, insurance, negotiable instruments, banking, and other matters, a great variety of legislation, sometimes conflicting, whereas it is admitted that uniformity, at least in respect to some of these matters, would be a distinct advantage. In fact, during recent years continuous efforts have been made, and considerable success has already been achieved, toward obtaining uniformity of legislation upon some of them. This has been brought about through the efforts of the National Commission on Uniform State Laws, which has prepared drafts of statutes on various subjects and secured their adoption by the concurrent action of the various state

<sup>12</sup> Leacock, "Limitations of Federal Government," *Proceedings of the American Political Science Association*, vol. V. p. 39.

<sup>13</sup> See among other instances the controversy between the United States and Japan growing out of certain anti-Japanese legislation in California. *Amer. Pol. Sci. Rev.*, vol. I, p. 393 and *Amer. Jour. of Int. Law*, vol. I, p. 273.

legislatures.<sup>14</sup> The necessity, however, of obtaining the concurrence of forty-eight state legislatures to any proposed law naturally makes the task a slow and difficult one and the results achieved have been only partial. This defect, however, is not inherent in the federal system. It is due rather to the way in which the legislative power in the United States has been distributed between the Union and the component states. In fact, in practically all the other countries in which the federal system of government has been established, e.g., Switzerland, Canada, Brazil, Australia, Germany and Austria the national legislature, as pointed out in a previous chapter, has been given power to legislate upon such matters as crime, criminal procedure, marriage, divorce, banking, insurance, bills of exchange, promissory notes, and in Germany and Austria upon a variety of other subjects. The result is in all such countries there is uniformity of law upon these matters.<sup>15</sup> The situation, resulting from what has come to be recognized as an outgrown distribution of powers, in the United States, has been the subject of much recent discussion and the alleviation of the difficulty has been sought in some degree not only through the process of concurrent state legislation referred to above, but by an extension of the power of the national government, largely through the process of constitutional interpretation.<sup>16</sup> Even in the British dominions, where the federal system was more recently established, there has been "a continuous and persistent tendency" to extend the powers of the central government and to curtail those of

<sup>14</sup> See Terry, "Uniform State Laws in the United States" (1920).

<sup>15</sup> As to this see Munro, "The Constitution of Canada," ch. I, p. 297; James, "The Constitutional System of Brazil," pp. 21 ff.; Brooks, "Government and Politics of Switzerland," p. 61; Brunet, "The New German Constitution," pp. 61 ff.; Foley, "The Federal System of the United States and the British Empire," p. 330; and Goodnow, "Principles of Constitutional Government," p. 67.

<sup>16</sup> This tendency is approved by Root, "How to Preserve the Local Self-Government of the States" ("Addresses on Government and Citizenship"), Ford, "The Influence of State Politics in Expanding Federal Power," *Proc. Amer. Pol. Sci. Assoc.*, vol. II, p. 53, and by Croly, "The Promise of American Life," ch. 14. But it is deplored by Pierce, "Federal Usurpation" (1908), and West, "Federal Power" (1919).

The effect of the 14th amendment has been to increase materially the control of the national government over the states. See Moore, "Increased Control of State Activities by the Federal Courts," *Proc. Amer. Pol. Sci. Assoc.*, vol. V, pp. 64 ff.; and Scott, same subject, *ibid.*, vol. II, pp. 346 ff. Further federal control of the states has been brought about through the exercise by the national

the provinces or states. This tendency is considered by some writers as evidence that a form of federal government in which the powers either of the central government or the state governments are specifically enumerated is defective, because any enumeration which may be made at one time will ultimately cease to be in harmony with changed conditions and have to be altered either by formal amendment or interpretation to conform them to those conditions.<sup>17</sup>

Among other weaknesses of the federal system may be mentioned its complexity, the danger of conflicts of jurisdiction between the national and state authorities, the duplication of governmental machinery and services which it involves and the consequent increased expense of operating it, and the difficulties which are encountered in the administration of justice due to the network of state boundaries.<sup>18</sup>

government of a hitherto latent police power (see Cushman's articles in the *Minn. Law Rev.*, 1919-20) and through the increasing practice of granting subsidies to the states, subject to specified conditions (see Douglas, "A System of Federal Grants in Aid," *Pol. Sci. Quar.*, June and Dec., 1920).

<sup>17</sup> Compare Goodnow, "Principles of Constitutional Government," p. 78.

<sup>18</sup> As to this latter aspect, see Willoughby and Rogers, "Introduction to the Problem of Government," pp. 481-482. Commenting on the federal system, De Tocqueville said, "It is one of the combinations most favourable to the prosperity and freedom of man. I envy the lot of those nations which have been enabled to adopt it." However, he expressed doubt whether such a government could maintain a long or unequal contest with a nation of similar strength in which the government is centralized. "Democracy in America," vol. I, p. 183. For further discussion of the weakness of federal government, see De Tocqueville, ch. 8, especially pp., 141, 150, 173, 176, 181, 183; also Dicey, "Law of the Constitution" (second ed.), p. 158; Bontin, "Études de droit constitutionnel," pp. 156-158; Lefur und Posener, "Bundesstaat und Staatenbund," sec. 78, and Sidgwick, "Elements of Politics," ch. 26. A comparison of the federal system of the United States with that of Canada is made by Professor Smith of McGill University in a work entitled "Federalism in North America" (1923). A similar comparison is made between that of the United States and those of Canada and Australia by A. P. Foley in "The Federal System of the United States and British Empire" (1913). According to both authors the preponderance of advantages is with the latter, because of the less diversity of legislation in the British federations. See also Marriott, *op. cit.*, vol. I, chs. 9-10. Bryce sums up the "faults" of federal government as follows:

1. Weakness in the conduct of foreign affairs.
2. Weakness in home government, that is to say, deficient authority over the component states and the individual citizens.
3. Liability to dissolution by the secession or rebellion of states.
4. Liability to division into groups and factions by the formation of separate combinations of the component states. "The American commonwealth," ch. 29.

## VI. CABINET GOVERNMENT

**Elements of Strength : (1) Collaboration between the Executive and the Legislative Departments.**—In the first place, it is claimed for the cabinet system that it is the only system which (except, of course, the discarded autocracy) insures harmonious co-operation between the executive and legislative branches of the government. As pointed out in a previous chapter, the feature which distinguishes it from the presidential system is the conjunction of the executive and legislative organs. The cabinet—the real executive body—is in effect a committee of the legislature. Its members are usually at the same time members of the legislature ; in the rare cases in which they are not, they are permitted to occupy seats in the legislature, or one chamber thereof, for the purpose of being heard and of being interpellated in regard to their official acts and policies. They may themselves introduce and advocate the adoption of the legislative measures which they wish to have enacted into law and the granting of the appropriations of money which in their opinion are necessary to carry on the government. When the measures which they propose have been enacted into law the cabinet is charged with seeing that they are executed ; when the services which they propose to establish are provided for by law, they see that these services are duly organized and put into operation : and when the sums of money which they ask for are granted, they are charged with seeing that they are properly expended and applied to the purposes for which they were appropriated. From first to last there is full and harmonious collaboration between the law-making and money-granting authorities, on the one hand, and the law-enforcing and money-spending authorities, on the other. This results normally from the fact that the cabinet is made up of representatives of the majority party in the legislature or the chamber to which it is responsible. Consequently, there is no working at cross purposes and rarely and deadlocks between the executive and legislative organs such as may happen, and frequently do happen, in countries where the presidential system is in existence. Manifestly this unity of purpose, this intimate and direct connection between the two great political departments of government, whose harmonious co-operation is so essential, is one of the outstanding merits of the cabinet system. No other system is so well adapted to securing prompt, expeditious and efficient governmental action.

**(2) Responsibility.**—In the second place the cabinet system is the only system under which the responsibility of those who execute the laws, administer the government, and spend the public revenues is effectively provided for. This responsibility is immediately to the legislature, or to the chamber which rests upon a popular basis, and indirectly and more remotely to the electorate. At any moment when the policies or acts of the cabinet cease to meet the approval of the chosen representatives of the people it may be turned out of office and a new one having the confidence of the legislature installed in its place. But in case the cabinet believes that its own policies, rather than those of the legislature, represent the opinions of the electorate, it may have the legislature dissolved and may appeal directly to the electorate and have it decide the issue. Thus the right of dissolution furnishes the cabinet with an arm of defense and at the same time insures that the will of the electorate shall prevail.

The obvious merit of such a system is that those who actually govern the country are always subject to the control of those who are governed—a control which may be exercised in the first instance by their chosen representatives, and in the second instance, when there is a conflict of opinion between them and the cabinet, by the people themselves through the form of a parliamentary election. Under such a system a prolonged continuance, by those who govern, of policies and conduct which do not meet the approval of the people or of their representatives is impossible. It is not necessary to endure them until the expiration of a term of years, as is necessary when the presidential system prevails: as stated above, the government may be turned out of office at any time and the will of the people or that of their elected representatives given immediate effect. Such a system is often and very properly described as “responsible government” and because it is such in a more marked degree than the presidential system, it has commended itself to the peoples of the vast majority of the countries of the world.<sup>19</sup>

<sup>19</sup> Lord Bryce, discussing the merits of the cabinet system, remarked that it “concentrates the plenitude of power in one body, the legislature, giving to its majority that absolute control of the executive which enables the latter, when supported by the legislature, to carry out the wishes of the majority with the maximum of vigor and promptness. The essence of the scheme is that the executive and the majority in the legislature work together, each influencing the other. Being in constant contact with members of the opposition party as well as in still closer contact with those of their own, they have opportunities of feeling the pulse

(3) **Flexibility.**—A third merit claimed for the cabinet system—one which Bagehot emphasized<sup>20</sup>—is its flexibility and elasticity, which may be elements of strength in times of national emergency and crises. Under such a system, as Bagehot pointed out, the people can, upon sudden emergencies, "choose a ruler for the occasion," one who may be especially qualified for guiding the nation through a dangerous crisis.<sup>21</sup> "Under a presidential system," he said, "you can do nothing of the kind. The American government calls<sup>4</sup> itself a government of the supreme people; but at a quick crisis, the time when a sovereign power is most needed, you cannot find the supreme people. You have got a Congress elected for one fixed period, going out perhaps by fixed installments, which cannot be accelerated or retarded; you have a President chosen for a fixed period, and irremovable during that period: all the arrangements are for stated times. There is no elastic element; everything is rigid, specified, stated. Come what may, you can quicken nothing and can retard nothing. You have bespoken your government in advance, and whether it suits you or not, whether it works well or works ill, whether it is what you want or not, by law you must keep it."

of the assembly and through it the pulse of public opinion. The system is therefore calculated to secure swiftness in decision and vigor in action and enables the cabinet to press through such legislation as it thinks is needed and to conduct both domestic administration and foreign policy with the confidence that its majority will support it against the attacks of the opposition. To these merits there is to be added the concentration of responsibility. For any faults committed the legislature can blame the cabinet and the people can blame both the cabinet and the majority." "Modern Democracies," vol. II, p. 454. Compare also Marriott, *op. cit.*, vol. II, pp. 64 ff. <sup>20</sup> "The English Constitution," ch. 2, sec. 9.

<sup>21</sup> As was done in England during the Crimean War and again during the World War. Dicey, in his article cited above (*Nineteenth Century*, Jan., 1919), emphasizes the value of flexibility as one of the chief merits of the cabinet system. He also mentions as one of the important merits of the cabinet system, as compared with the presidential system, the fact that in the former, the members of the cabinet and therefore those who govern the country are the acknowledged parliamentary leaders, whereas the members of the cabinet under the presidential system are not and cannot be such. They may be, and in the United States they often are, men who are without legislative experience and who in no sense can be regarded as leaders. Professor Laski ("Grammar and Politics," p. 300) also emphasizes this merit of the cabinet system. The average American cabinet, he says, "rarely represents anything at all," whereas the average member of an English cabinet "has been tried and tested over a long period in the public view." He has the "feel" of his task long before he comes to that task. He has spent his earlier career in contact with the operations he is now to direct.

**Defects of the Cabinet System.**—Some objections have been urged against the cabinet system. First, it violates a principle of government much cherished by certain political thinkers in that it means a virtual union of legislative and executive functions which, it is said, should be kept separate and intrusted to distinct organs, each independent, or nearly so, of the other.<sup>22</sup> It should be said, however, that this is largely a theory, the practical value of which has hardly been demonstrated by the results of actual experience. On the contrary, it is believed that the history of the actual working of cabinet government has established the value of the intimate connection between, and close coöperation of, the executive and legislative departments, which is one of the outstanding features of the cabinet system. In the second place, it has been urged against the cabinet system that it is too largely a system of party government—that especially in countries where there are only two important political parties, it places the whole control of public policies in the hands of the party which has the majority in the legislature or in the particular chamber to which the cabinet is responsible.<sup>23</sup> It is not easy to see, however, why this is not equally true of the presidential system. In fact, in the continental European countries generally, where the cabinet system is found and where usually no single party has a majority in the legislature, the cabinet is controlled not by a single party but by a bloc of parties.

In the third place, the cabinet system of Great Britain, especially, has recently been criticized as “a dictatorship of one man or of a small

<sup>22</sup> See the criticism of Sidgwick (*op. cit.*, p. 444), who while admitting that the cabinet system has the merit of insuring harmony between the two chief organs of government, maintains that it nevertheless has “serious drawbacks.” Ministers, he says, are likely to be distracted from their executive duties by their legislative tasks, while parliament is “tempted away from legislative problems by interesting questions of current administration, in which, especially in foreign affairs, it is liable to interfere to an excessive extent.”

<sup>23</sup> Lord Bryce, referring to the “serious defects” of the parliamentary system, remarks that it “intensifies the spirit of party and keeps it always on the boil. Even if there are no important issues of policy before the nation there are always the offices to be fought for. One party holds them, the other desires them, and the conflict is unending—it is like the incessant battle described as going on in the blood vessels between the red corpuscles and the invading microbes. In the legislature it involves an immense waste of time and force. Though in theory the duty of the opposition is to oppose only the bad measures and to expose only the misdoings of the administration, in practice it opposes most of their measures and criticizes most of their acts. A system which makes the life of an

group of men exercised through a subservient party majority of more or less tied members." The House of Commons has, it is said, practically ceased to exercise its power of legislation, having virtually abdicated its functions in favour of the cabinet, which contents itself with the negative rôle of a vetoing and controlling body. "In short, the real government of Great Britain is nowadays carried on, not in the House of Commons at all, nor even in the cabinet, but in private conferences between ministers, with their principal officials and the representatives of the persons especially affected by any proposed legislation or by an action on the part of the administration."<sup>24</sup> This is in part true. The House of Common is an assembly so large and unwieldy that effective discussion has become in large measure impossible; the power of legislation has tended to shift from the House to the ministry and the former

administration depend upon the fate of the measures introduces, disposes every cabinet to think too much of what support it can win by proposals framed to catch the fancy of the moment, and to think too little of what the real needs of the nation are, and may compel the retirement, when a bill is defeated, of men who can ill be spared from their administrative posts." *Op. cit.*, vol. II, pp. 466-468. The late Professor Dicey, in his article on "Cabinet *versus* Presidential Government," in the *Nineteenth Century* (Jan., 1919), mentioned two defects of the cabinet system: first, it is government by a collegial or plural executive and for this reason is especially weak in time of war or grave national crises; second, it is government of an extremely partisan character, that is, government of men who have risen to leadership, who are maintained in power by partisanship, and whose policies are colored by partisanship. But it may be asked, is this latter indictment any less applicable to the presidential system? Professor Laski, who bestows high praise upon the cabinet system, nevertheless admits that we cannot be blind to its demerits. It certainly gives to the executive, he says, an opportunity for tyranny, and under it the legislature may be reduced, as it was during, the premiership of Lloyd George, merely to an organ for the registration of decisions which it is powerless either to criticize or to alter. *Op. cit.*, p. 347. This criticism does not seem convincing. If the cabinet becomes a tyrant and the legislature a rubber stamp it is because the latter permits it. It may also be observed that under the presidential system of the United States, Congress, at least it was so alleged, was reduced to the same rôle during the presidency of Mr. Wilson.

<sup>24</sup> See Sidney and Beatrice Webb, "A Constitution for a Social Commonwealth of Great Britain" (1920), p. 67. See also the criticism of L. D. H. Cole ("Labour in the Commonwealth," 1919, pp. 101-104); Sidebotham ("Political Profiles," 1921, pp. 245-251); Belloc ("The House of Commons and Monarchy," 1920, pp. 9 ff.), and Dodds ("Is Liberalism Dead?" 1920, pp. 71 ff.), the burden of which is that the House of Commons is in a state of decadence and that it is dominated by the ministers. See also the criticism by Laski of the present status of the cabinet system in England, in his pamphlet "The Crisis and the Constitution" (1932).

has come to be mainly a "ventilating chamber."<sup>25</sup> In these circumstances the House, as Bagehot remarked, chooses its leaders and then follows them. It is as if the House were to say to the ministers, "There are too many of us to legislate; we have therefore chosen you to guide and direct us because we recognize you as our leaders and because we have confidence in you; we leave it to you to formulate the legislative measures which in your judgment should be passed, and to determine the sums of money which you consider necessary to carry on the established public services and the taxes required to produce these sums. If we think the measures which you propose are wise, we will give our assent, and so with the grants of money which you demand and the taxes which you propose. We shall, however, watch over and control you and hold you accountable for your conduct and policies, and we warn you that whenever they cease to meet our approval we will turn you out and confer our authority on a new set of ministers." To this extent the House, as stated above, has abdicated its initiative and leadership in favor of a small select body of its members in whom it has full confidence.

It is a fair question to raise, however, whether the American system, under which the House divides itself into a multiplicity of committees, each of which is a miniature legislature and in the narrow rooms of which all real legislation takes place, is any better solution than that of Great Britain, where the House relies upon a single committee composed of its parliamentary leaders. Under modern conditions with large and unwieldy legislative assemblies the actual work of legislation must necessarily be devolved upon smaller groups. The British system is based on the view that the better solution is to devolve this authority on a single committee composed of the leaders of the majority party in parliament; on the other hand, the Americans prefer

<sup>25</sup> As to this compare Low, "Governance of England," p. 75, and Lowell, "The Government of England," vol. I, p. 326. "To say that at present the cabinet legislates with the advice and consent of Parliament," remarks Mr. Lowell, "would hardly be an exaggeration." But he also observes that "if the parliamentary system has made the cabinet of the day autocratic, it is an autocracy exerted with the utmost publicity, under a constant fire of criticism." See also the remarks of Lord Cecil to the effect that parliament no longer legislates, that function having in fact passed to the cabinet. Quoted by Marriott in his "Second Chambers," p. 58.

to divide it among a large number of committees upon which both parties are unequally represented.<sup>26</sup>

### **Defects of the Cabinet System Peculiar to Certain Countries.**

—Naturally there are certain defects of cabinet government which are not necessarily inherent in the system itself but are due to special conditions in the different countries where the system is in operation: such as the peculiar political psychology and traditions of the people, the existence of a multiplicity of political parties, and the methods of parliamentary procedure which are followed. Thus in France the unreadiness of the chambers to follow their chosen parliamentary leaders as the British House of Commons does, the abuse of the practice of interpellation to harass the ministers, the disposition to throw them out on relatively unimportant—sometimes trivial—issues rather than upon fundamental questions of general policy, have made the smooth working of the cabinet system impossible.<sup>27</sup> In consequence of the existence of the multiple party system on the continent of Europe generally, the success of the cabinet system has been markedly less than in Great Britain.<sup>28</sup> There cabinets are necessarily constituted on the coalition principle; they are consequently weak, and being responsible to a bloc of parties, they are usually short-lived.<sup>29</sup> The result is, as pointed out in a previous chapter, cabinets rise and fall with distressing rapidity, and the conduct of the government is charac-

<sup>26</sup> Both Lord Bryce and Woodrow Wilson dwelt upon the defects of the American system of committee legislation. Mr. Wilson pointed out that the House could not be led by sixty-odd committees and argued that there should be a smaller body analogous to the British cabinet to examine, sift out, and choose from among the enormous mass of bills which are annually poured into the congressional hopper, those for which there was a real need, and for steering them through Congress. See his "Congressional Government," ch. 2.

<sup>27</sup> M. Fauguet, in his "Dread of Responsibility" (p. 181), says the French ministers are merely "clerks of parliament."

<sup>28</sup> It has recently been stated in the press dispatches that there are twenty-one political parties in Poland. According to the usual classifications there are at least a dozen in France and as many in Germany.

<sup>29</sup> Compare the discussion by Bonn in his "The Crisis of European Democracy" (1925), ch. 6. Mr. Bonn dwells upon the existence of the multiple party system on the Continent and the effect it has on the working of cabinet government, which, he says, is carried on to-day by blocs. In consequence, it has frequently resulted in paralysis, has created much dissatisfaction, and has intensified the popular demand for dictatorships.

terized by instability and lack of continuity of policy.<sup>30</sup> It was this situation in Italy which under Mussolini's leadership has brought about the most interesting of all innovations upon the cabinet system, namely, provision that the political party which elects a bare majority of the chamber shall for the purpose of voting be reckoned as having two thirds of the members.<sup>31</sup>

## VII. PRESIDENTIAL GOVERNMENT

**Characteristics of the Presidential System.**—As pointed out in a previous chapter, the distinguishing characteristic of the presidential system is the almost complete separation of the executive and legislative departments and the independence of each as against the other, especially in respect to their policies and powers and the duration of their tenure. The chief executive is chosen for a special term fixed by the constitution; his powers are determined in large measure by the constitution; the members of his cabinet are appointed by him: they are subject to his direction and control; they hold office at his pleasure; they are not and cannot be at the same time members of the legislature nor even (except, e.g., in Argentina) occupy seats therein for the purpose of being heard or interpellated; and they are not (nor is the president) responsible to the legislature for their official acts or policies. However much their acts or policies may be disapproved by the legislature or the electorate they cannot be turned out of office by votes of censure, condemnation, or want of confidence. They may misgovern the country or govern it inefficiently, but the president has a constitutional right to his office until the legal expiration of his

<sup>30</sup> This defect of the cabinet system is especially marked in France. Nevertheless, one must be on one's guard against judging the results by the number of cabinet changes. As to this see my article on "Cabinet Government in France," *Amer. Pol. Sci. Review*, vol. VIII (1914), especially pp. 373 ff.; Shotwell, "The Political Capacity of the French," *Pol. Sci. Quar.*, vol. XXIV, pp. 119; and Shepilo, "The Drift in French Politics," *Amer. Pol. Sci. Review*, Nov. 1913, p. 385.

<sup>31</sup> It is doubtful whether under the present régime the cabinet system really exists in Italy. Mussolini in a recent interview (*New York Times*, July 24, 1926, p. 3) virtually admitted that he had got rid of it. He criticised the vices of Italian parliamentarism as "the worst of the brood." He said, "The Italian parliamentary system consisted of talking lengthily and doing nothing: proclaiming fine phrases and satisfying personal ambition, bureaucracy ensnared all movement, and the executive power was practically non-existent."

term, and the members of his cabinet have a right to theirs so long as the president sees fit to retain them. Only if their conduct becomes criminal may they be turned out by the legislature, and then only by the cumbersome procedure of impeachment. If the views of the legislature in respect to public policies are different from those of the president and the cabinet, he cannot dissolve the legislature and appeal to the electorate to decide the issue. He must get along with a hostile legislature the best he can until the expiration of their constitutional mandates, and they too must endure executive policies which they disapprove until the expiration of his term. It may happen, and has in fact often happened, that the president belongs to one political party while the legislature is controlled by another, in which case there may be a deadlock between the two great departments and therefore a state of paralysis such as can hardly exist under the cabinet system.

**Defects of the Presidential System.**—To Europeans such a system appears autocratic, irresponsible, and dangerous.<sup>32</sup> It is autocratic because the president is independent of control by the chosen representatives of the people; he may govern very largely as he pleases for the duration of his term, and so long as his conduct is not criminal he cannot be turned out of office, even if every member of congress and every voter in the land should desire his removal. It is irresponsible because he cannot be held accountable to the legislature for his acts. It may censure him, refuse to pass the measures he recommends, decline to give him the authority for which he asks, for example in times of emergency, override his vetoes, and the like, but it cannot deprive him of his constitutional powers or withdraw the mandate which the electorate gave him at the time of his election. It is true that theoretically he is responsible to the electorate for the manner in which he exercises this mandate, but in the absence of provision for a popular recall there is no way by which it can be enforced. Manifestly the refusal to re-elect the president after several years of misgovernment is no effective enforcement of responsibility.<sup>33</sup> It may happen that he

<sup>32</sup> See Esmein in his "Droit constitutionnel" (5th ed., 1909), p. 419.

<sup>33</sup> The late Henry J. Ford justly remarked that the true distinction between despotism and constitutional government is not so much that the former is unlimited while the latter is, as in the existence of means by which the responsibility for the exercise of power may be effectively enforced. It is not necessarily dangerous, therefore, to confer unlimited power upon an officer or agent if

is not a candidate for reelection or may not, in consequence of law or custom, be eligible to reelection. In that case the electorate has no opportunity to express an opinion on the president's conduct or policies, much less to turn him out of office.

Other defects of the presidential system are: the lack of direct initiative on the part of the president and the members of his cabinet in respect to legislation, the loss of energy and efficiency resulting from deadlocks between the executive and legislative departments and from the lack of harmonious collaboration between them, and (if we consider the multiple committee system to be a feature of presidential government) the admittedly unsatisfactory methods of legislation through the agency of a large number of committees, often with overlapping jurisdiction, each independent of the others, none of them being responsible for the legislation which they recommend and all of them deliberating under conditions such that they are little affected by the force of public opinion.<sup>31</sup>

adequate means are provided by which he can be held accountable for the manner in which he exercises it. "Representative Government," p. 394.

<sup>31</sup> As to this compare Bryce, "The American Commonwealth," vol. I, chs. 14-15 and 20-21; also his "Modern Democracies," vol. II, p. 462; Wilson, "Congressional Government," chs. 2, 5; also his "Constitutional Government," ch. 4; Godkin, "Unforeseen Tendencies in Democracy," pp. 96-145; Ford, "Rise and Growth of American Politics," chs. 18-22; and Stimson in the *Independent*, 1913, p. 12<sup>25</sup>. Lowell ("Government of England," vol. II, p. 53?) remarks that "in countries where power is divided among a number of bodies, or hidden away in committees, responsibility is intangible. Every one can throw it off his shoulders and it may become the subject of a game of hide-and-seek."

Lord Bryce discussed the strength and weakness of the presidential system with his accustomed fairness and good judgment. Like the cabinet system it was, he thought, built for safety rather than for speed. The multiple committee system which is one of its features, he thought, means much delay, confusion, and working at cross purposes. The "separation of powers" has turned out in practice to be "the forcible disjunction of things naturally connected. The presidential system leaves more to chance than does the parliamentary system. Nevertheless, for administrative purposes it is a gain that the ministers are not obliged to give constant attendance upon the legislature, and when a minister starts a promising policy he can count on carrying it through without the danger of being upset by a sudden change of government. Moreover, legislatures are less dominated by party spirit under the presidential system than under the cabinet system. There is also a greater sense of stability, partly because a shifting of the political balance can take place only at election times fixed by law and partly because the legislature by withholding appropriations of money may check the executive in any project thought to be risky. Lord Bryce was bound to admit, however, that the presidential system is defective in the matter of

Happily, however, the chief dangers of the presidential system, namely those which are always possible in consequence of the constitutionally autocratic character of the presidential office and the unenforceable responsibility of the incumbent, have never revealed themselves in practice in the United States. There have been few serious complaints on this score and the number of Americans who would displace the presidential system for the parliamentary type is probably not large. With the conceptions which prevail in the United States relative to the office and rôle of the chief magistrate, they would be unwilling to exchange him for a titular figurehead such as the introduction of the cabinet system would require.<sup>35</sup>

**Why the Cabinet System was Not Introduced in the United States.**—The question has been discussed as to why the cabinet system was not introduced into the United States along with other English legal and political institutions when the colonies separated from the mother country and became independent. In one form or another that system was then, as now, by far the most common type of government throughout the world and it would have been very natural for the Americans to have adopted it, at least with such modifications as their political notions and conditions seemed to require. But they did not; on the contrary, they invented a new system greatly unlike that of the mother country. The late President Wilson expressed the opinion that they did not introduce it because it was in more or less disrepute in America and because it possessed many features which did not invite republican imitation. To most Americans, he said, the English constitution was that of George III and Lord North rather than that of the Whigs, while the ministry was looked upon as a coterie of royal favorites who were controlled by the crown rather than by the House

executive responsibility. When the executive and the legislature are at odds, each can shift the responsibility to the shoulders of the other and the country must tolerate the deadlock until what may be a distant election brings relief.

*Op. cit.*, vol. II, pp. 468-471.

<sup>35</sup> Probably the following opinion of the late Professor Henry J. Ford is that of most Americans: "It must be reckoned a fortunate circumstance for the American people that parliamentary institutions of the English type are precluded by the constitution of the United States, which like the constitution of Switzerland incapacitates the members of the assembly from holding executive office at the same time. The Swiss type and not the English type is the only form in which representative government can be actually established in the United States." "Representative Government," p. 198.

of Commons.<sup>36</sup> They found it hard to believe that the legislative and executive branches could be brought into such close relations as the cabinet system involved without the legislature being dominated by the executive. To avoid the danger of executive domination, therefore, it was thought necessary to keep the two departments separate, and to this end they established a system of checks and balances such as the cabinet system did not permit.

Lord Bryce explained the failure of the Americans to adopt the cabinet system, by their ignorance of its real character. They did not know it, he said, because it was still immature, because Englishmen themselves did not understand it, and because the recognized authorities did not mention it.<sup>37</sup>

**Early Parliamentary Methods in the United States.**—It may be observed, however, that in the beginning a procedure bearing some resemblance to parliamentary methods was actually followed by Congress. Cabinet members frequently appeared in the House of Representatives for the purpose of giving information and for consultation.<sup>38</sup> Hamilton, the first Secretary of the Treasury, especially assumed the rôle of a crown minister, and his example was followed by other cabinet members. At the time, all branches of the government were housed in the same building, so that communication between the executive and legislative departments was greatly facilitated; they were in fact in almost as close touch as if the cabinet ministers had been members of Congress.<sup>39</sup> For some years these close relations were maintained and the cabinet ministers exerted an important influence in the shaping of legislation.<sup>40</sup> When finally continuance of this relationship was definitely terminated and the members of the cabinet were excluded from appearing in Congress, some members of Congress expressed regret at the change.<sup>41</sup>

<sup>36</sup> "Congressional Government," pp. 308, 309.

<sup>37</sup> "The American Commonwealth" (ed. 1910), vol. I, p. 286.

<sup>38</sup> For instances, see the Annals of the First Congress, pp. 51, 16, 194, 689.

<sup>39</sup> Compare Ford, "Rise and Growth of American Politics," pp. 81, 276.

<sup>40</sup> Compare McConachie, "Congressional Committees," pp. 221 ff., and Follett, "The Speaker," pp. 319, 327 ff.

<sup>41</sup> Thus Fisher Ames lamented that the change reduced the members of the cabinet to the position of "chief clerks." "Instead of being the ministry," he said, and "imparting a kind of momentum to the operation of the laws, they are prevented from communication with the House by reports. In other countries they

**Proposals to Allow Cabinet Members to Occupy Seats in Congress.**—As time passed and the disadvantages resulting from the disjunction of the executive and legislative departments and the obvious advantages of a closer relationship in the processes of legislation became more and more manifest, proposals were made on several occasions to revert to the earlier practice and indeed to permit cabinet ministers to occupy seats in either house of Congress for the purpose of answering questions, giving information, and advocating the enactment of measures recommended by the President. Such a proposal was made by a select committee of the House in the 38th Congress and by a similar committee of the Senate in the 46th Congress (1881). Judge Story in his work on "The Constitution"<sup>42</sup> dwelt upon the advantages of such a procedure, and more recently President Taft in a special message to Congress (1913)<sup>43</sup> urged its adoption. President Wilson was also known to be in favor of the proposal. By bringing the executive and legislative departments face to face for the purpose of consultation and collaboration, instead of keeping them at arm's length and working at cross-purposes, the time of Congress, it was argued, would be economized, a channel would be afforded by which Congress could keep itself better informed of what the executive department was doing, harmony of action between the two departments would be promoted, and the executive would be relieved from much unnecessary criticism based on misunderstanding and lack of accurate information. "The ignorance," said President Taft, "that Congress at times has of what is actually going on in the executive department,

may speak as well as act; we allow them to do neither; we forbid them even the use of a speaking trumpet; or, more properly, as the constitution has ordained that they shall be dumb, even forbid them to explain themselves by signs."

<sup>42</sup> See, 869.

<sup>43</sup> *Congressional Record*, Jan. 13, 1913, p. 12. It may be remarked in this connection that the constitution of the Southern Confederacy authorized the congress to grant to cabinet ministers the privilege of occupying seats in either house and of taking part in the discussion of measures pertaining to their departments. It may also be observed that the present constitution of Argentina (Art. 93) permits ministers to attend the sessions of congress and to take part in the debates but without the right to vote. It also allows them the preference over members of the chamber when they desire to speak. The constitution of Brazil, however, (Art. 51), expressly forbids them from appearing in either chamber. In Switzerland, where the cabinet system does not exist, members of the federal council have the right to attend the sessions of both chambers, to speak, and to make motions, though not to vote (Art. 101).

and the fact that hours of debate and pages of the *Congressional Record* might be avoided by the answer to a single question by a competent cabinet officer on the floor of either house, is frequently brought sharply to the attention of competent observers.<sup>44</sup> As it is, the only means by which Congress may obtain official information regarding the policies of the President is through the slow and circumlocutory process of a formal resolution addressed to the President and his reply thereto;<sup>45</sup> the only way by which the President may get his proposals for legislation actually introduced as bills before Congress is through the action of kindly disposed members; and the only way by which he can secure a hearing before the committees is through his cabinet ministers, when they are invited to appear. The admission of cabinet members to Congress would enable the President to exert in an open and official manner that influence upon Congress which the country more and more expects of him and which his responsibility to the country implies. As it is, his official power is exhausted when he has delivered his formal message to Congress, since neither he nor his cabinet members may follow up openly his recommendations by oral explanations, argument or persuasion.<sup>46</sup>

### VIII. THE BEST FORM OF GOVERNMENT

**Tests by which Government may be Judged.**—Such are the elements of strength and weakness of the principal systems of government that are in operation to-day or which have existed in the past. After this review we may naturally ask which of them is the best and which, if any, is likely to be the most generally accepted form of the future. Both questions are difficult to answer. It was a wise observa-

<sup>44</sup> See his article on "The Presidency" in the *Independent*, 1913, p. 1197; also his book "Our Chief Magistrate and His Powers," p. 31. But Mr. D. F. Houston, a recent member of the cabinet, has expressed a contrary opinion (*World's Work*, Feb., 1926, p. 340). He prefers "the present practice of leaving cabinet members to appear before committees—unless we are willing to go the whole distance and adopt the parliamentary system," which he advocates, on the ground that it would be "more in harmony with our claims that we are a democratic people capable of governing ourselves."

<sup>45</sup> For such an instance see the *Congressional Record* of Jan. 29, 1862 (vol. XLVI, pt. I, p. 549).

<sup>46</sup> The whole subject of this section is discussed in more detail in my article "Executive Participation in Legislation" in the *Proceedings of the Amer. Pol.*

tion of Rousseau, when he said, "When you ask what is absolutely the best government you have asked an indeterminable and an unanswerable question."<sup>47</sup> The answer to the first question depends largely upon one's conception of what is the test of a good government and what are the fundamental purposes for which governments have been established. Naturally opinions differ as to the criteria by which the excellence of a particular form of government may be judged. Some writers have attempted to lay down certain general principles concerning the best system for all peoples and conditions of human society. But manifestly there are no *a priori* standards by which any particular type of government may be given the preference over other types. The excellence of each must be judged by the degree to which it achieves the results for which it was established and which it was expected to accomplish. Conceptions as to the ends which governments are designed to promote have varied among different peoples. With some, considerations of efficiency, economy, vigor, and promptness of action have been regarded as the primary tests. Among the Germans, for example, this test has received the chief consideration. Among the Americans, on the other hand, there has been a disposition to judge the value of government by the degree to which it awakens and stimulates the interest of the citizens in public affairs, inculcates habits of loyalty and patriotism in the people, and promotes the civic virtues generally; in short, the best government is not necessarily that which is the most efficient, but that which serves in the highest degree the purpose of a school of citizenship for the political education and training of the citizens. This appears to have been the view of John Stuart Mill, who said "the first element of a good government" is the "promotion of the virtue and intelligence of the people." Government, he said, is not only "a set of organized arrangements for public business" but it is

*Sci. Assoc.*, 1912-14, pp. 176 ff. See also Hinsdale, "The Cabinet and Congress," *ibid.*, 1905, pp. 126 ff.; Snow, "A Defense of Congressional Government," *Amer. Hist. Papers*, 1890; Bradford, "Congress and the Cabinet," *Annals Amer. Acad. of Pol. and Soc. Sci.*, vols. III and IV (1892, 1893), and Snow, *n' id.*, vol. III; and Black, "The Relation of the Executive Power to Legislation," ch. 4. A very strong argument in favor of the admission of cabinet members to seats in Congress with the right to participate in the debates concerning matters relative to their departments was made by Nicholas Murray Butler in his address, "A Program of Constructive Progress," before the Commercial Club of St. Louis, July 16, 1918.

<sup>47</sup> "The Social Contract," bk. I, ch. 9.

also "a great influence acting on the human mind" and its value must be judged by its action upon both men and things. The first question to be considered, he added, is "how far does the government tend to foster the moral and intellectual qualities of the citizens?" The government which does this best, he maintained, is likely to be the best in other respects. The main criterion of a good government, in other words, is the degree to which it tends to increase "the sum of good qualities" in the governed, collectively and individually, rather than the efficiency of the government itself as an administrative body.<sup>48</sup>

Other writers have adopted the view of the poet :

"For forms of government let fools contest,  
That which is best administered is best."

According to this view the mere form of a government is of secondary consideration; the test of its excellence is rather the success with which it is operated. But as Hamilton remarked, this doctrine is a "political heresy" because a bad form of government can hardly be well administered, while a good one may be badly administered.<sup>49</sup>

**Adaptability of Government to Peoples and Conditions.**—It is hardly necessary to observe that no single form of government is suitable for all peoples or all conditions and stages of human society. In determining what is the best government for any particular society we must take into consideration the stage of development which the society has attained, the intelligence and political capacity of the people, their history and traditions, their race characteristics, and a variety of other elements. "To attempt," said John Stuart Mill, "to say what kind of government is suited for every known state of society would be to compose a treatise on political science at large."

Both Mill and Bryce very properly emphasized a truth often overlooked, that after all governments are established and operated by men ; they do not grow and perform their functions like trees ; in every stage

<sup>48</sup> "Representative Government," ch. 2.

<sup>49</sup> Hamilton himself thought "the test of a good government" was its "aptitude and tendency to produce a good administration." *The Federalist*, No. 66. Rousseau laid down the following curious test of the best government : "all other things being equal, the government under which, without external aids, without naturalizations, and without colonies, the citizens increase and multiply most, is infallibly the best. That under which a people diminishes and decays is the worst." "Social Contract," bk. II, ch. 9. In short, the test of the excellence of a government is the degree of the birth rate of the population, the absurdity of which is obvious.

of their existence they are what they are made by voluntary human agency ; consequently their success depends mainly upon the capacity and interest of those who establish and operate them.

Monarchy is a necessary system for certain peoples;<sup>50</sup> aristocracy is better adapted to certain others ; while democracy is still better suited to other societies. As has been pointed out, the cabinet system works more smoothly and with greater success in Great Britain than it does in the Latin countries, and it is probably a greater success in Great Britain than it would be in the United States if it were introduced here. Universal suffrage may be well suited to certain stages of society, while in others it would lead to a breakdown of government. Federal government is excellently adapted to certain stages of political development, and to certain countries, especially those of vast extent and where there is great diversity of conditions, while unitary government is better suited to others. Confederate government and even theocracies, as appears from a preceding chapter, have their places in the development of the state. No single form of government is adapted to all societies any more than a suit of clothes could be made to fit all men. The system best suited to Sparta was not the best for Athens : what is best for a large empire is not necessarily the best for a state of small area. What was the best for England in the time of the Tudors is not the best for England to-day. If mere security of life and property are the main objects to be attained, then a very different kind of government will suffice from that which is necessary when the promotion of the social well-being of the people is considered a necessary object. "If," said Lieber, "the object is to reform and reorganize the debased and nerveless population of a large country in a tropical climate as that of Egypt, the government must essentially differ from that of

<sup>50</sup> Thus Lord Bryce and President Good now think monarchy is better suited than democracy to China in her present state of political development. John Stuart Mill, himself an ardent believer in democracy, admitted that absolute monarchy was the only form of government suited to backward and undisciplined races. Lord Bryce was apparently of the opinion that real democracy is not workable in some of the Latin American republics, Persia, and Russia, and he expressed the belief that some of the democratic experiments that have been attempted in certain countries of southeastern Europe had better have been left untried. "Modern Democracies," vol. II, pp. 502-507. Compare also the opinion of Burgess ("Reconciliation of Government with Liberty," p. 257), that the peoples of various Latin-American republics are quite unfit for self-government. Rousseau, referring to the adaptability of laws and governments to particular

an industrial people who, like the Dutch, must battle with the sea."<sup>51</sup> Government is like a house which must be adapted in construction to the peculiar purposes and needs of those who dwell in it, and it must be altered from time to time as those needs change and multiply.

**The Government of the Future.**—Manifestly it would be hazardous to indulge in speculation as to what is likely to be the most generally accepted government of the future. It is probably safe to say that no single system is likely to become universal, considering the wide diversity of local conditions and conceptions which prevail throughout the world and which are likely to continue to prevail until the end of time. Nevertheless, there are marked tendencies everywhere toward certain forms and away from others, which indicate that the whole world is moving along certain definite lines in its search for the best system of government. Thus the drift is undoubtedly away from monarchial, autocratic, absolute, and hereditary forms. Most of the monarchies that survive to-day are really such only in name, being in fact republics. Traces of aristocracy, autocracy, and hereditary government still survive here and there, but they seem destined to disappear totally at no distant date. It seems very probable that all states will ultimately become constitutional, representative, democratic republics,—perhaps long before the end of the present century. It seems likely, however, that while representative government will become universal, the bases and forms of representation will undergo important changes. There is at present wide-spread dissatisfaction with the existing system of representation in many countries, and experiments are being made with new systems. The late Professor Henry J. Ford, who in his last years devoted himself to the study of the subject, concluded that "there is much to suggest that representative government is a decaying form of state," yet he thought it is largely due to a confusion of the genuine article with what is really a spurious form. What seems likely to take place in the civilized world, he thought, is not a rejection of representa-

peoples, said: "A thousand nations that have flourished on the earth could never have had good laws; and even those that might have done so could have succeeded for only a very short period of their whole duration. The majority of nations are tractable only in their youth; they become incorrigible as they grow old." Again: "One nation is governable from its origin, another is not so at the end of ten centuries." "The Social Contract," bk. 1, ch. 8.

<sup>51</sup> "Political Ethics," vol. 1, p. 313.

give government but a "weeding out of its spurious forms."<sup>52</sup> This is what Mussolini claims to have done for Italy.

**Outlook for Democracy.**—The most marked of all modern political tendencies has been the rapid drift toward democracy, and this form of government is now in varying degrees very nearly universal. It has in fact been carried to such lengths that even in countries where the soil is most fertile for its introduction and the conditions most favorable for its growth there is believed to be danger of a breakdown. Lord Bryce, an ardent and sympathetic defender of democracy, did not hesitate to express in his last work the view that the prospects for its future in certain countries where it has lately been introduced are not altogether encouraging. Although it was frequently asserted that one of the objects of the late war was to make the world safe for democracy, democracy as a method of government has become more suspect and discredited among nations than ever before in modern times, and large sections of public opinion in democratic countries are to-day clamoring for dictatorships. But here again it is said that the trouble is not with democracy itself but with its perversion and the attempt to substitute spurious and false forms for the true and genuine article. Already there are signs of reaction in many countries, and in some of them recently it has virtually broken down.<sup>53</sup> What seems likely to happen is not either the abandonment of democracy or the increasing multiplication of democratic expedients, which in their totality will create a burden which the electorate cannot bear, but a return to a more moderate representative type.

**Outlook for Federal Government.**—Whether the governments of the future are likely to be more generally federal or centralized in character is a question which is more difficult to answer. It must be

<sup>52</sup> "Representative Government" (1924), pp. 303-314. Referring to what he called "the spurious forms" of representative government, he said: "No other sort of government the world has ever known has given power and opportunity to so many worthless characters or has produced a class rule of quite so dangerous a type." *Ibid.*, p. 305. Compare also F. A. Judson, "The Future of Representative Government," *Amer. Pol. Sci. Rev.*, vol. II.

<sup>53</sup> See, e.g., the recent address of Mussolini to the Fascisti of Italy (*New York Times*, May 29, 1926), in which he declared that democracy in Italy was dead. M. Clemenceau in his new book, "La civilisation" (1926), likewise expressed doubt whether democratic government is likely to continue. See also the observations of Norman Angell in his "The Public Mind," pp. 1 ff.

admitted that the federal system with so many obvious merits has not spread throughout the world to the extent which its votaries predicted, and in the relatively few countries where it has been introduced in recent times it has assumed important modifications which distinguish it fundamentally from the American type which was the first important example. In its modified form it is in reality a combination of federalized administration and centralized legislation and this would seem to be the form which it is likely to take wherever it is introduced in the future.

**Outlook for Cabinet Government.**—Finally, as between the presidential and cabinet systems, the outlook appears to be distinctly in favor of the latter. Aside from certain Latin-American states the example of the United States has not been imitated by other countries and it does not seem probable that it will be in the future. Even in the United States the tendency seems to be in the direction of the establishment of closer connection between the executive and legislative organs; on the other hand, in the more recently established cabinet systems there is evidence of a disposition to give the head of the state more real power and a larger independence of legislative control. Perhaps the system of the future may be a resultant of the two tendencies.<sup>51</sup>

**The Value of Good Government.**—In a sense the travail of the ages has been to find a system of government which will best serve the common needs of those for whose benefit governments are established. The systems adopted have varied widely in different ages and among different peoples and there is still no universal consensus or practice as to which system is the best. On one point, however, there is agreement, namely that upon the existence of a good government, more than anything else, the happiness and prosperity of peoples depend. As Mr. Elihu Root<sup>52</sup> has well said: "The fairest and most

<sup>51</sup> Compare Burgess, "Political Science and Constitutional Law," vol. II, p. 31. Burgess thinks the generally accepted form of the future will be a republic with a system of centralized legislation and federalized administration; that the executive will be independent in tenure, and with a real veto power over the acts of the legislature; but that he will be bound to keep his cabinet ministers in political accord with the majority in the lower house of the legislature.

<sup>52</sup> "The Citizen's Part in Government," p. 6. Compare also John Stuart Mill (*op. cit.*, ch. 2), who observed that "every kind and degree of evil of which mankind are susceptible, may be inflicted on them by their government; and

fertile parts of the earth have been for centuries wilderness and desert because of bad government ; not only lands capable of supporting multitudes in comfort and prosperity, but lands that have actually done so in the past, are to-day filled with wretchedness and squalor, with ignorance and vice, because of bad government ; while under good government industry and comfort flourish on the most sterile soil and under the most rigorous climate."

none of the good which social existence is capable of, can be any further realized than as the constitution of the government is compatible with, and allows scope for, its attainment—the influence of government on the well-being of society can be considered or estimated in reference to nothing less than the whole of the interests of humanity."

## CHAPTER XVII

### THE PROVINCE OF GOVERNMENT

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## I. THEORIES RELATIVE TO THE FUNCTIONS OF GOVERNMENT : THE ANARCHIST VIEW

**Anarchist Doctrines.**—The theories that have prevailed and still prevail regarding the necessity and the function of the state range all the way from those which deny the necessity or utility of the state and which indeed regard it as an iniquity, to those which laud it as "the mightiest creation of the human mind, the noblest expression of human purpose"<sup>1</sup> and as the essential institution by which all social, industrial, artistic, literary, and scientific progress has been achieved.<sup>2</sup>

At one extreme are the anarchists, who while differing among themselves in respect to certain details, are in agreement in their hostility toward what they call the "coercive" state, and in their desire to see it abolished. One group of them—the revolutionary anarchists

would go to the length of employing violence to get rid of it; consequently they advocate assassination of government officials, the destruction, by bombs or otherwise, of government buildings, and the like. The other group—the philosophical anarchists, consisting mainly of intellectuals, would limit their activities to argument and propaganda, in the effort to convince mankind of the uselessness of the state and the superiority of the régime of anarchy. They claim to be opposed not to all government as such, but only to that which is founded upon the principle of coercion or compulsion; in short, it is to government to which they have not freely given their consent that they object. To the argument that modern democratic government rests in fact upon the consent of the governed they reply that this is merely a theory and not a fact. At least, they say, it means only the consent of the majority, and even that consent is rarely given freely and expressly. In any case, they say, a great minority is subjected to coercion and compulsion to which they have never assented and to which they never would assent if the opportunity were afforded to record their opinion

<sup>1</sup> Giddings' apotheosis, "The Responsible State," p. 48.

<sup>2</sup> Ward, "Pure Sociology," p. 555.

by a vote. Huxley defines anarchy as a state of society "in which the rule of each individual by himself is the only government the legitimacy of which is recognized—one in which he is not coerced into coöperation for the defense of his neighbor.<sup>3</sup> According to Kropotkin, the most intellectual exponent of the doctrines of anarchy, the essential feature of the anarchistic régime is that there will be no compulsion, no law, and no government exercising force.<sup>4</sup> The anarchist is opposed to every existing system of government not only because it exercises compulsion upon the individual without his consent and is therefore an enemy to liberty and genuine self-government, but also because all governments without exception have proved themselves inefficient ; they are arbitrary and tyrannical and therefore hateful ; they are conducted in the interests of the privileged classes ; the alleged equality of treatment which they profess to mete out to all has no real existence. The individual, says the anarchist, has as much moral right to coerce society as it has to coerce him.<sup>5</sup> Some anarchists, like Tolstoi, condemn the state also because it fosters and wages war. By means of propaganda it poisons the minds of its citizens against the peoples of other nations ; it commits acts of spoliation, aggression, and robbery ; it is therefore the arch criminal and destroyer of the human race.<sup>6</sup>

**Substitutes for Government.**—Anarchists are not entirely agreed among themselves as to the nature of the régime which they would establish in the place of the state, but those who have hazarded constructive proposals suggest that a system of voluntary associations and arrangements in which each individual would be free to join or not as he chooses, and from which he might freely withdraw at will, would be an adequate and desirable substitute for the "coercive" state.<sup>7</sup> These associations would perform the few necessary functions of government: the preservation of internal order, the enforcement of

<sup>3</sup> "Collected Essays," vol. I, p. 393. Compare also B. Russell, "Proposed Roads to Freedom," p. 33 ; Jethro Brown, "The Underlying Principles of Modern Legislation," p. 7, and Zenker, "Anarchism," p. 3. Anarchy means "the removal of all restrictions upon conduct intrinsically ethical and legitimate but which ignorant legislation has interdicted as criminal." Art. "Anarchism" in Bliss, "Encyclopedie of Social Reform," p. 55.

<sup>4</sup> See his "Fields, Factories, and Workshops" and his "Conquest of Bread".

<sup>5</sup> Tucker, "Instead of a Book," p. 137.

<sup>6</sup> See his books "What to Do" and "The Kingdom of God Is with You."

<sup>7</sup> Such was the substitute proposed by Benjamin Tucker ("Instead of a Book," pp. 32, 326) and by Kropotkin ("Law and Authority," pp. 18 ff.).

contracts, maintenance of the national defense, etc. They would offer their services to those who needed their protection and under the influence of competition those which were the most efficient or charged the least would get the greater part of the business. From the anarchist point of view, the superiority of such a system over that of the existing régime would consist in the absence of the elements of force and compulsion ; it would be a system based entirely upon the free consent of each individual and would therefore be a régime of complete liberty and of self-government.

**Answer to the Anarchistic Argument.**—It is unnecessary to analyze in detail the arguments put forward by the anarchists in support of their contentions. It is sufficient to say that their whole case is defective; first, because it rests upon unsound assumptions regarding the character of what they call "coercive" government, and, second, because the substitutes which they propose to take its place would prove wholly inadequate to meet the situation which exists in the complex societies of to-day. Their criticism of the state is not without some justification, but it is grossly exaggerated and any effective conceivable substitute would not be free from the same objection.

They are wrong in assuming, as they seem to do, that all governmental activity is founded on and begotten of aggression, and that it necessarily involves the use of force or restraint. A large part of the activity of every modern government is in the form of aid and assistance and involves no compulsion upon any individual. Moreover, their assumption that force and restraint can be eliminated from the world is not justified by the results of experience or our knowledge of human nature. If history teaches anything it is that if all limitations upon individual freedom were removed and each individual allowed to determine for himself the limits of his own liberty, conflicting determinations would result, those who have the physical power would enforce their decisions against the weak, and we should have not a régime of liberty for all, but the tyranny of the strong and the subjection of the weak.<sup>8</sup> Unlimited liberty, as Ritchie aptly remarked, has never been claimed by any sane or reasonable person.<sup>9</sup> The law of human life from the cradle to the grave is the law of limitation.<sup>10</sup>

<sup>8</sup> Compare Burgess, *op. cit.*, vol. I, p. 88, and Lacy, "Liberty and Law," p. 100.

<sup>9</sup> "Studies in Political and Social Ethics," p. 136.

<sup>10</sup> Compare McKinnon, "History of Modern Liberty," vol. I, p. vii.

Even if human nature were different, so that physical restraint would be unnecessary to insure right conduct by normal men, society would still be exposed to danger from the acts of the insane, the moral degenerate, and those who commit crime in the excitement of momentary passion.<sup>11</sup> As Bertrand Russell, himself a sympathetic critic of anarchism, remarks : "If, as anarchists desire, there were no use of force by Government, the majority could still band themselves together and use force against the minority. The only difference would be that their army or their police force would be *ad hoc*, instead of being permanent or professional." His own conclusion is that "the anarchist ideal of a community in which no acts are forbidden by law is not, at any rate for the present, compatible with the stability of such a world as the anarchists desire."<sup>11a</sup> The state in some form, whatever may be said in criticism of its mistakes, its inefficiency, its abuse of power, is and always will be an absolute necessity among civilized men. As Seeley justly remarked, whatever in human history is great or admirable has been found in governed communities, that is, it has been the result of the imposition of restrictions upon liberty.<sup>12</sup> If the state were abolished, after a brief period of anarchy the patriarchial stage or some other "natural" grouping of a more rudimentary form would be established ; that is, society would begin over again from its lowest elements and only by the ultimate reestablishment of the state could it escape from savagery and barbarism.<sup>13</sup> Nevertheless, as some sympathetic critics of the doctrine of anarchy have pointed out, while anarchists are wrong in most of their assumptions and while the substitutes which they propose to take place of the state would prove ineffective, certain of their indictments against government, as we know it in its actual working, are largely justified. In all states there are social, economic, and political evils, due in large measure to bad, inefficient, indifferent, or corrupt government, which have tended to discredit the state in the minds of many persons and to create contempt for the authority of government. One well-known writer, referring to the evils of which anarchists complain, remarks: "Anarchism confronts our sense

<sup>11</sup> Compare Douglas, "Anarchism," in Merriam and others, "Political Theories. Recent Times," p. 215. <sup>11a</sup> "Proposed Roads to Freedom," pp. 121, 199.

<sup>12</sup> "Introduction to Political Science," p. 127.

<sup>13</sup> Compare Ritchie, *op. cit.*, p. 57 ; Amos, "Science of Law," p. 78, and Jevons, "The State in Relation to Labor," p. 13.

of citizenship with a challenge which we should do well to take seriously, and the believer in political institutions should seek to make them more worthy of popular allegiance."<sup>14</sup>

## II. THE INDIVIDUALISTIC OR *Laissez Faire* THEORY

**The Theory Explained.**—The individualist, unlike the anarchist, considers the state a necessity, though he is nearly in agreement with the anarchist in regarding it as essentially an evil, and hence believes its sphere of activity should be restricted to the narrowest possible limits, consistent with the maintenance of peace, order, and security. The individualistic doctrine regards all restraint *qua* restraint as an evil, and every extension of the power of the state as involving a corresponding diminution of the domain of individual liberty. It holds that the state is a necessity simply because of the inherent egoism of man, which leads him to disregard the rights of his fellow men for his own selfish purposes. A well-known Frenchman, Jules Simon, expressed the individualistic idea in extreme form when he said the state ought to strive to make itself useless and prepare for its own demise.<sup>15</sup> The same idea was expressed by the historian Freeman, in language which has a decided anarchistic ring, when he remarked that "the ideal form of government is no government at all; the existence of government in any shape is a sign of man's imperfection."<sup>16</sup> The state exists, argue the individualists, merely because crime exists, and its principal function, therefore, is to protect and restrain, not to foster and promote.<sup>17</sup> When the state owns and operates railroads for transporting freight and passengers; when it carries parcels for private individuals; sends telegrams; subsidizes theaters and gives concerts for public entertainment; maintains libraries, museums, art galleries, hospitals, zoölogical gardens, parks, playgrounds, bath and wash houses; erects dwellings

<sup>14</sup> Brown, "The Underlying Principles of Modern Legislation," p. 31. Compare also Joad, "Modern Political Theory," pp. 102-103.

<sup>15</sup> Quoted by Laveleye in his "Le gouvernement dans la démocratie," vol. I, p. 24.

<sup>16</sup> Essays, p. 353.

<sup>17</sup> "Imaginez en effet une politique parfaite," says Janet, "un gouvernement parfait, des lois parfaits, vous supposez par là-même des hommes parfaits. Mais alors la politique ne serait plus autre chose que le gouvernement libre de chaque homme par soi-même; en d'autres termes, elle cesserait d'être. Et cependant, c'est la seule fin et son idéal. L'objet du gouvernement est de préparer insensiblement less hommes à cet état parfait de société où les lois et le gouvernement lui-même deviendraient inutiles." "Histoire de la science politique," vol. I, p.c.

for the poor; provides schools, colleges, and institutions of research; and sends out scientific expeditions,—it not only does what is not necessary for the protection of the individual, which is the only justification for the existence of government, but it encroaches upon the domain of private enterprise and thereby interferes with the liberty of the individual. Most individualists therefore condemn public education; sanitary, vaccination, and quarantine laws; laws regulating the conduct of trade and industry; pure food laws; and indeed all legislation the effect of which is to impose restrictions upon industry or business or to interfere with the social or moral habits of individuals. In short, they say, the sole duty of the state in regard to industry and morality is to leave them alone.<sup>18</sup> The modern state attempts to do entirely too many things, say the individualists. "*Ne pas trop gouverner*," "*laissez faire, laissez passer*," express their conception of its legitimate duty. It should be nothing more than a police organization to enforce contracts, protect property, keep the peace, punish crime, and defend society against foreign aggression ; and when this is done, its functions are exhausted.<sup>19</sup>

**Origin of the Doctrine of Individualism.**—Individualism as a political doctrine had its origin in the latter part of the eighteenth century as a reaction against the evils of over-government in Europe. It was one of the leading tenets of the physiocratic school of economists that the state ought not to interfere with the economic activities of the people by prescribing conditions under which industry should be carried on, but should confine its functions to the simple protection of the laws of nature under which production would best regulate itself

<sup>18</sup> Donisthorpe, "Individualism," p. 38 ; Michel, "L'idée de l'état, p. 630. "It cannot be too carefully remembered," declares Bruce Smith ("Liberty and Liberalism," p. 257), an ardent individualist, "that almost every clause of an act of parliament, if it has force and effect at all, takes away liberty from somebody because it must of necessity speak of something which shall or shall not be done where before it was optional."

<sup>19</sup> Huxley in his essay on "Administrative Nihilism," referring to the attitude of the individualists, said : "According to their views, not a shilling of public money must be bestowed upon a public park or pleasure ground ; not a sixpence upon the relief of starvation, or the care of disease. Those who hold these views support them by two lines of argument. They enforce them deductively by arguing from an assumed axiom, that the state has no right to do anything but protect its subjects from aggression. The state is simply a policeman, and its duty is neither more nor less than to prevent robbery and murder and enforce contracts."

if left alone.<sup>20</sup> They accordingly attacked the prevailing notions regarding the omnipotence of the state and demanded freedom of trade and industry. This doctrine received a powerful stimulus from the publication of Adam Smith's "Wealth of Nations" (1776), which was largely a plea for a policy of non-interference by the state in economic matters. Smith denounced the laws then in force restricting the free interchange of the products of labor and interfering with the free employment of labor, as mischievous and destructive of their own purpose. Later the doctrine of natural liberty in economic matters was defended by various other English economists, notably Cairnes, Ricardo, and Malthus; by the French writers Bastiat, De Tocqueville, Dunoyer, Léon Say, and Taine; and by the German philosophers Kant, Fichte, Wilhelm Humboldt, and the Baron Eötvos. Still more recently the individualistic doctrine found earnest advocates in Laboulaye, Michel, and Leroy-Beaulieu in France, and in Herbert Spencer, John Stuart Mill, Earl Wemyss, the Duke of Argyle, Bruce Smith, Wordsworth Donisthorpe, and others in England.<sup>21</sup>

One of the earliest arguments in favor of the "governmental minimum" was written by a Prussian, Wilhelm Humboldt, in 1791, but for political reasons it was not published until 1852, after the author's death. It was entitled "Ideen zu einem Versuch, die Grenzen der Wirksamkeit eines Staates zu bestimmen."<sup>22</sup> Humboldt laid down the proposition that the state should "abstain from all solicitude for the positive welfare of the citizens and ought not to proceed a step farther than is necessary for their mutual security and protection against foreign enemies." For these purposes only should it impose restrictions upon individual liberty.<sup>23</sup> "The grand point to be kept in view

<sup>20</sup> Compare Sidgwick, "Political Economy," p. 3'9.

<sup>21</sup> The *laissez faire* theories were vigorously exploited and popularized in England by the "Liberty and Property Defense League," an organization formed for the purpose of "resisting over-legislation and for maintaining individualism as opposed to socialism." It printed and distributed thousands of pamphlets, leaflets, and some books, dealing with the growing tendency to substitute government regulation in the place of individual management and enterprise in all branches of industry, and attempting to show the paralyzing effect of this kind of legislation upon the national development. It scrutinized all projects of legislation and endeavoured to prevent the enactment of laws contrary to the principles for which the league stood.

<sup>22</sup> This essay has been translated into English under the title "Sphere and Duties of the State," by Joseph Coulthard (London, 1854).

<sup>23</sup> See especially ch. 3.

by the state," he said, "is the development of the powers of all its single citizens in their perfect individuality; it must, therefore, pursue no other object than that which they cannot procure for themselves, viz. security; and this is the only true and infallible means to connect, by a strong and enduring bond, things which at first sight appear to be contradictory -- the aim of the state as a whole and the collective aims of all its individual citizens."<sup>24</sup>

**John Stuart Mill's Defense.**—In England the individualistic theory of government found a powerful defender in John Stuart Mill. In his famous essay on "Liberty" (1859) he made the following classical statement of the individualistic doctrine:

"The sole end for which mankind are warranted individually or collectively in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. . . . The only part of the conduct of anyone for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is of right, absolute. Over himself, over his own body and mind, the individual is sovereign."<sup>25</sup>

There is a class of actions, he said, which affect only the doer of them ("self-regarding" acts) and another class ("social" acts) which affect both the author and the community at large. For the former class of acts, the individual is unaccountable to society and cannot be rightfully punished for them further than by the disapprobation of public opinion.<sup>26</sup> If the individual be in "the full maturity of his powers," society has no right to say that he shall not do with his life what he chooses to do. Any other view, he added, ascribes to mankind a vested interest in each other's moral, intellectual, and even physical perfection, the extent of which must be determined by each claimant according to his own standard.<sup>27</sup>

<sup>24</sup> *Ibid.*, p. 184. It is interesting to note in view of Humboldt's ideas concerning state aid to education that in later life he was minister of public instruction in Prussia and as such was the founder of the University of Berlin, an institution supported and maintained by the state.

<sup>25</sup> People's Edition, p. 6.

<sup>27</sup> *Ibid.*, p. 53.

<sup>26</sup> *Ibid.*, pp. 46, 55.

**Herbert Spencer's Defense.**—The most elaborate if not the most convincing defense of the *laissez faire* doctrine of government was made by Herbert Spencer in a series of essays published near the middle of the nineteenth century, under the collective title "Social Statics" and "Man *versus* the State,"<sup>28</sup> which at the time did much to popularize the doctrine but which today finds few readers and still fewer supporters. Spencer started out with the assertion that the existence of the state is the result of man's inherent perversity and egoism and that in reality it is an aggressor rather than a protector. "Be it or be it not true," he said, "that man is shapen in iniquity and conceived in sin, it is unquestionably true that government is begotten of aggression and by aggression." Being instituted merely for the purpose of curbing his wicked propensities and protecting him from the violence and fraud of his fellows, it follows that in a morally perfect condition of society, government can have no *raison d'être*. "Have we not shown," he asked "that government is essentially immoral? . . . Does it not exist because crime exists, and must government not cease when crime ceases, for very lack of objects on which to perform its functions?" He went on to say that "it is a mistake to consider that government must last forever. . . . It is not essential, but incidental. As amongst Bushmen we find a state antecedent to government, so may there be one in which it shall have become extinct." The doctrine that the state is justified in doing whatever seems to those in authority to be "expedient," or whatever tends to produce the "greatest happiness," or which will subserve the "general good", Spencer denounced as governmental despotism, since there is no standard or test for determining what is expedient or what is for the general good except the opinions of the governors themselves. In the first edition of his "Social Statics" (1866) he even spoke of the right of the individual to "ignore" the state, "drop connection" with it, relinquish its protection, throw off its burdens, and adopt a condition of voluntary outlawry.<sup>29</sup>

He dwelt upon what he called the *militant* type of society, with its excessive regimentation and its army-like organization; he compared this with the *industrial* type, contrasted the condition of the individual under the régime of *status* with his condition under a régime of *contract*, as he called it, and emphasized the advantages of voluntary over com-

<sup>28</sup> The edition here used is that of 1903 (published by Appleton). <sup>29</sup> Ch. 19.

pulsory cooperation and of negative over positive regulation. The experience of the past, he affirmed, proves that the acquisition of happiness does not come through state action, but through being left alone. Cutting away men's opportunities on one side in order to add to them on another is nearly always accompanied by loss, through the friction of administrative mechanism. The sphere of government should be "negatively regulative," that is, its functions should be to redress evils, not to try to make men happier by helping them to do what they can do as well or better themselves. "To administer justice, to mount guard over men's rights," are the only proper functions of the state; and when it does more, it defeats its own ends. The duty of the state is to formulate in law pre-established rights, not to create them, and to enforce them instead of intruding on them like an aggressor. The individual has but one right, the right of equal freedom with everybody else, and the state but one duty, the duty of protecting that right against violence and fraud.

**Spencer's Condemnation of State Interference.**—Spencer inveighed against all legislation for the regulation of commerce and trade; against sanitary legislation, such as quarantine, vaccination, and registration laws; against public education; against poor relief by the state; and even against state-managed post offices and currency issued by the state. Every attempt to mitigate the suffering of the poor through state aid, he declared, "eventuates in the exacerbation of it." The sums devoted to the support of paupers should go to support laborers in new reproductive works.<sup>30</sup> In regard to education by the state, he observed that "taking away a man's property to educate his own or other people's children is not needful for the maintenance of his rights and hence is wrong."<sup>31</sup> State intervention is legitimate only for the protection of violated rights, and the rights of children are not violated by neglect of their education. The idea that it is the duty of the state to undertake to protect the health of the people Spencer combated with equal ardor, though he admitted that the state might suppress nuisances.<sup>32</sup> All taxation for sanitary superintendence must, he said, be condemned. He went to the length even of maintaining that it is a "violation of the

<sup>30</sup> "Social Statics" (ed. of 1903), p. 152.

<sup>31</sup> "Social Statics" (ed. of 1903), p. 156.

<sup>32</sup> *Ibid.*, p. 200.

"moral law" for the state to "interpose between quacks and those who patronize them," or to prevent unlicensed persons from prescribing for the sick, since it is the inalienable right of the individual to "buy medicine and advice from whomsoever he pleases," and the unlicensed practitioner should have the same right to sell to whomsoever he will. Regarding the right of the state to monopolize the issue of money, he maintained that it cannot justly forbid the issue of or enforce the acceptance of certain notes or coin in return for other things, since that would be an infringement of the natural right of exchange and a violation of the law of equal freedom.<sup>33</sup> Finally, Spencer condemned the construction of public works by the state except such as might be necessary for the national defense and rejected its right to a monopoly of the postal service, since "it is clear that the restriction thus put upon the liberty of trade by forbidding private letter-carrying establishments is a breach of state duty."<sup>34</sup>

**The Sins of Legislators.**—Much of Spencer's case against the state was based upon the errors and blunders of particular governments in the past. The statute books, he lamented, were a record of "unhappy guesses." "Nearly every parliamentary proceeding is a tacit confession of impotence, for the great majority of legislative measures introduced are designed to amend and improve existing laws." In an essay entitled "The Sins of Legislators," Spencer reviewed much of the unwise legislation of the past, dwelt upon the evils which resulted from it, and concluded that because most of this legislation was in time repealed or modified it ought never to have been enacted. He protested against what he called the worship of the legislature and asserted that as the great political superstition of the past was the divine right of kings, that of the present is the divine right of parliaments. And the divine right of parliaments means only the divine right of the majority, for the minority has no right to be respected.<sup>35</sup> Some men actually seem to think, he said, that individuals can be made moral by an act of the legislature and that that which is economically unsound can be made sound and wise by the fiat of the state.

Some of Spencer's followers, such as Donisthorpe and Auberon

<sup>33</sup> *Ibid.*, pp. 221-226.

<sup>34</sup> *Ibid.*, p. 231.

<sup>35</sup> *Ibid.*, p. 381.

Herbert, went to even greater lengths in their opposition to state regulation. They not only opposed education by the state; poor relief; inspection of factories, mines, and workshops; the regulation of injurious trades; compulsory vaccination laws; quarantine and health regulations; the requirement of official oaths; Sunday legislation; laws regulating public amusements; restrictions upon the sale of liquor, etc.,—but they even denied to the state the right to regulate the marriage relation or restrict in any manner individual liberty in social matters except in so far as it is absolutely necessary to protect each man from the positive aggressions of his fellows.<sup>36</sup>

**Defense of the *Laissez faire* Theory : (1) Argument Based on Justice.**—In defense of the individualistic conception of the sphere of state activity it is argued, in the first place, that considerations of justice require that the individual shall be let alone by the state in order that he may realize fully and completely the ends of his existence. This particular line of argument had the powerful support of such scholars as Kant, Fichte, Humboldt, and John Stuart Mill. According to their views it is necessary to the harmonious development of all the powers of the individual that he should be interfered with as little as possible by the state, because every restriction upon his freedom of action tends to destroy his sense of initiative and self-reliance, weaken

<sup>36</sup> There is reason to believe that in his later life Spencer's views underwent considerable modification. John Fiske relates ("Life and Letters," II, 248) that when Spencer visited the United States in 1882, he expressed regret at the excessive competition in the industrial world and was willing to admit the desirability of state regulation. See also his "Essays," vol. III, pp. 471 ff., and Merriam, "American Political Ideas," p. 324. One of the few present day followers of Spencer is Sir Roland K. Wilson, who in a work entitled "The Province of the State" (1911), vigorously defends the individualistic conception of government. He condemns the performance by the state of various public services such as the operation of the post office, public education, provision for public worship, aid to science and art, the maintenance of hospitals, and other activities in which all states actually engage. He conceives the state to be merely a "justice-enforcing association"; the only legitimate state, he says, is the "libertarian" state, and the only reason for maintaining it is "the certainty of continual strife and generally triumphant injustice if every man were a judge in his own case." As to state education, he says, "of all the policies the most indefensible is that of forcing everybody to pay for, and forcing all children into, schools in which all debatable topics are tabooed" (p. 108). State provision for elementary education is "bad for morals and liberty, and state provision for secondary education is several degrees worse" (p. 103).

his responsibility as a free agent, impair his energies, and blunt his character.

"The true end of man, or that which is prescribed by the immutable dictates of reason," observed Humboldt, "is the highest and most harmonious development of his powers to a complete and consistent whole." Over-government, he went on to say, not only diminishes freedom, but "superinduces national uniformity and a constrained and unnatural manner of action" by its tendency to reduce society to a dead level.<sup>37</sup> The same line of argument was pursued by Mill, who asserted that an excess of government, especially of the meddling and inquisitorial sort, "starves the development of some portion of the bodily or mental faculties, when it deprives one from doing what one is inclined to do or from acting according to one's judgment of what is desirable."<sup>38</sup> Free competition develops in the individual the highest possibilities, sharpens and strengthens his powers of initiative, and increases his sense of self-reliance; while over-government not only hampers enterprise and interferes with the natural development of trade, but strikes at the development of character, tends to crush out individuality and originality by interfering with the natural struggle between individuals, and leads to a general lowering of the social level.<sup>39</sup> The highest civilization, say the *laissez faire* advocates, has been developed under individualism, a system which has produced more material and educational progress than could ever have been produced under paternalism. Spencer dwelt upon the fact that in an over governed state "everybody is like everybody else." Government management and control of industry, he complained, is "essentially despotic"; it "unavoidably cramps" by diminishing liberty of action, "angers," leads to discontent, "galls by its inefficiency and restrictions," offends by professing to help those whom it will not allow to help

<sup>37</sup> "Ideen," chs. 1 and 2.

<sup>38</sup> "Political Economy" (ed. of 1844), vol. II, p. 561: cf. also Kant in his "Principles of Politics" (translation by Histic, p. 36). "Individualism," says Michel, in his "L'idée de l'état" (p. 372), "stands for the emancipation of the man, the complete development of all his powers, and the full enjoyment of all his rights as an individual." Again, he says, "Individualism is alone capable of furnishing a rational foundation for the philosophy of right as well as political liberty and the sovereignty of the people." *Ibid.*, p. 620.

<sup>39</sup> Compare Bruce Smith, "Liberty and Liberalism," p. 320; and Argyle, "Reign of Law," p. 340.

themselves, and vexes by the swarm of dictatorial officials who are forever stepping in between men and their pursuits.<sup>40</sup> The "evils of officialism" and of "socialistic meddlings," he declared, prevent the healthy and natural development of a people, while freedom develops and strengthens individual character and conduces to human progress. "A people among whom there is no habit of spontaneous action for a collective interest," said Mill, "who look habitually to their government to command and prompt them in matters of joint concern—who expect to have everything done for them except what can be made an affair of mere habit and routine—have their faculties only half developed; their education is defective in one of its most important branches."

(2) **The Biological Argument.**—The *laissez faire* principle, say its advocates, rests also upon sound considerations of a scientific character. It is in harmony with the principle of evolution, since it is the only system that will lead to the survival of the fittest in the economic struggle. It assumes that self-interest is a universal principle in human nature, that each individual is a better judge of what his own interests are than any government can possibly be, and that if left alone he will follow them. It holds that each individual should be allowed to stand alone or fall according to his worth, unaided by the props and supports of the state; should be left to work out his own destiny without the guidance and tutelage of government. By leaving each individual to do unaided that for which he is best fitted, the strong and fit classes survive, the unfit elements are eliminated, and thus the good of society is promoted.

(3) **The Economic Argument.**—Again, and this is the most important argument of the *laissez faire* theorists, the policy of non-interference rests upon sound economic principles. Better economic results, it is asserted, are obtained for society by leaving the conduct of industry as far as possible to private enterprise. Adam Smith, in his "Wealth of Nations," pointed out that the system of natural liberty tends toward the largest production of wealth. The self-interest of the consumer will lead to the demand for the things that are most useful to society, while the self-interest of the producer will lead to their production at the least cost. In the economic struggle the individ-

<sup>40</sup> "Social Statics," p. 135.

dual is animated mainly by motives of self-interest. If, therefore, he is allowed to use his capital as he pleases, to dispose of his labor to the best advantage, to exchange the products of his toil freely, and to have prices fixed by the natural laws of supply and demand, better results, not only to himself, but to the whole of society, will be secured. Unrestricted competition stimulates economic production, tends to keep wages and prices at a normal level, to prevent usurious rates of interest, to secure efficient service and the production of better products than can be obtained by state regulation or state management.

(4) **Argument of Experience.**—The experience of the past, say the *laissez faire* advocates, abundantly establishes the wisdom of the non-interference principle. History is full of examples of attempts to fix by fiat of the state the prices of food and clothing and of many other commodities ; of laws regulating the wages of labor, prohibiting the wearing of certain kinds of apparel, and requiring the wearing of certain other kinds, forbidding the exportation of divers commodities, forbidding certain kinds of machinery in manufacturing processes, restricting the manufacture of certain articles to apprentices, prescribing the location of factories ; laws aiding and encouraging certain industries by means of bounties and subsidies, and discouraging certain others by prohibitive taxes ; laws prohibiting combinations among laboring men, fixing the hours of labor, restricting certain trades exclusively to members of guilds ; and even laws prescribing the cut of one's dress, the number of meals which one should eat, the sizes of buttonholes, the length of shoes, the making of pins, and the kind of material in which the dead should be buried. Most of such legislation was mischievous and destructive of the ends which it was intended to secure, and the results which were sought for could have been more effectively obtained by allowing every man to sell his labor and goods whenever and wherever he wished.<sup>41</sup> Speaking of those who were responsible for this sort of legislation, Buckle observed that "they went blundering along in the old track, believing that no commerce could flourish without their interference, hampering that commerce by repeated and harassing regulations, and taking for granted that it was the duty of every government to benefit the trade of its own people by injuring

<sup>41</sup> Cf. Smith, "Liberty and Liberalism," p. 247. For a review of such legislation see Hume, "History of England," vol. II, ch. 16, and Smith, *op. cit.*, ch. 6.

the trade of others."<sup>42</sup> The extent to which the governing classes interfered with the freedom of industry and the mischief which that interference produced were so remarkable, he concluded, as to make thoughtful men wonder how civilization could have advanced in the face of such repeated obstacles.

(5) **Argument of State Incompetency.**—Finally, the *laissez faire* theorists argue that it is a false assumption which attributes omniscience and infallibility to the state and which regards it as better fitted to judge of the needs of the individual, and to provide for them, than he is himself. There is, they assert, a common belief that governments are capable of doing anything and everything, and of doing it more efficiently than it can be done by private enterprise, when, in reality, experience and reason showed the contrary to be the fact. The state has no greater powers of invention or of initiative than the individuals who compose it and who must operate it; it is not a creative organ, but an "organ which acts only by means of a complicated apparatus, composed of numerous wheels and systems of wheels subordinated one to another"; it is an organ of criticism, of generalization, and of coördination, from which it follows that the state cannot be the first agent, the primary cause of progress in human society, but only an auxiliary or agent of propagation.<sup>43</sup> Every additional function, observed Mill, means a new burden imposed on a body already overcharged with duties; the result is that most things are ill done, and much is not done at all because the government is not able to do it without delays. The great majority of things are worse done, he declared when done by government than when done by individuals who are most interested, for the people understand their own business better and care for it better than any government can; all the faculties which a government enjoys of access to information, all the means which it possesses of remunerating and therefore of commanding the best available talent in the market, are not an equal for the one great disadvantage of an inferior interest.<sup>44</sup>

<sup>42</sup> "History of Civilization," vol. I, p. 313.

<sup>43</sup> Leroy-Beaulieu, "The Modern State," bk. I, ch. 5.

<sup>44</sup> "Political Economy," vol. II, p. 565. While the state possesses certain natural characteristics which give it a decided advantage as an industrial manager, it has, says Rae, in his work on "Contemporary Socialism" (p. 409), "one great natural defect, its want of a personal stake in the produce of the business it con-

**Criticism of the *Laissez Faire* Doctrine : Assumption that the State is an Evil.**—The individualistic theory of state functions has been criticized upon various grounds. First of all, the assumption that the state is a necessary evil, that all restraint as such is wrong,<sup>45</sup> has not been borne out by the experience of mankind under the régime of state organization. History, in fact, shows unmistakably that the progress of civilization in the past has been promoted to a very large degree by wisely directed state action ; in short, that the state is a positive good. It is true, of course, that at times the ends of the state have been perverted to the detriment of the public good, but this is no more reason for condemning it indiscriminately as an evil than for arguing that railroads are an evil because their operation sometimes results in accidents. Spencer's doctrine that the state exists only because crime exists, and that it would subserve no purpose in a society of morally perfect beings, cannot be accepted. The function of the state in the complex civilization of to-day is not merely repressive, not simply "negatively regulative"; it has a higher task than that of restraint and punishment : the task of protecting, encouraging, and fostering the common welfare.

So long as men live in groups they will have collective wants which can be satisfied only through state organization, and hence there is no reason for believing that the necessity for the state will ever disappear or that the rôle which it now plays in the life of human societies will ever diminish.

ducts, its want of that keen check on waste and that pushing incentive to exertion which private individuals enjoy in the eye and energy of the master. This is the great tiproot from which all the usual faults of government management spring—its routine, red-tape spirit, its sluggishness in noting changes in the public taste, and in introducing improved methods of production. Government servants may very generally be men of a higher stamp and training than the servants of a private company, but they are proverbial, on the one hand, for a certain lofty disdain of the humble but valuable virtue of parsimony, and, on the other, for an unprogressive, unenterprising, uninventive administration of business."

The objections to the extension of governmental functions beyond what is required to satisfy the individualistic standard are well summarized by Lecky, in his "Democracy and Liberty" (vol. I, p. 276).

<sup>45</sup> So argued Mill, "Liberty," p. 56. Had Mill laid down the proposition that all arbitrary, unnecessary, or unreasonable restraint—all "over-government,"<sup>49</sup> Seeley would say—is an evil, no objection could be made to his proposition. But to characterize all restraint as inherently evil in itself is to ignore the fundamental distinction between that which is useful and good and that which is bad.

**The Increasing Necessity of State Regulation.**—On the contrary, all signs indicate that with the increasing complexity of modern civilization the need for state action will become stronger and its rôle more extensive. In comparatively recent years a strong reaction against the individualistic movement of the earlier nineteenth century has everywhere taken place, due largely to the conditions resulting from the growth of manufactures, the congestion of the population in the cities, the growth of corporate wealth, and changed economic and social conditions generally,<sup>46</sup> all of which have thrown the *laissez faire* theory into disrepute. "The higher the state of civilization," observed Huxley, "the more completely do the actions of one member of the social body influence all the rest, and the less possible is it for any one man to do a wrong without interfering more or less with the freedom of all his fellow-citizens. So that even upon the narrowest view of the functions of the state it must be admitted to have wider powers than the advocates of the police theory are disposed to admit."<sup>47</sup> Laveleye pointed out in the same connection that as civilization progresses men become more dependent on one another and upon society as a whole, and hence the rôle of the state must increase correspondingly in order to satisfy their common wants. The individualism of Spencer, as Laveleye rightly concluded, is wholly inadmissible under the conditions of modern society.<sup>48</sup>

The view of the *laissez faire* advocates that state intervention in the interest of the common good necessarily involves a curtailment of individual freedom, rests on an assumption that is true only within very restricted limits. It is a very narrow view indeed which sees in a factory act, a pure food law, or a quarantine regulation nothing but

<sup>46</sup> As to the changed conditions and new problems which made the *Laissez faire* policy impossible see Hobhouse, "Social Evolution and Political Theory," pp. 168 ff., and Brown, "The Underlying Principles of Modern Legislation," pp. 46 ff.

<sup>47</sup> "Critiques and Addresses," p. 11. Compare also Mill, himself an individualist in most matters, who remarked that the restriction of government to the mere protection of person and property against force and fraud is a rule which cannot be strictly adhered to, for it "excludes some of the most undisputed and recognized functions of government," "Political Economy," vol. II, p. 387.

<sup>48</sup> "Le gouvernement dans la démocratie," vol. I, p. 38. See also an article by Laveleye in the *Contemporary Review* for April, 1885, in which the individualistic views of Spencer are criticized.

in infringement upon the domain of individual liberty.<sup>40</sup> Manifestly there can be no liberty in the absence of restraint; the greater the freedom of the strong man, the less will be that of the weak; and the liberty of some must involve restrictions upon the freedom of others. In short, the whole problem of creating and guaranteeing liberty is largely a problem of organizing restrictions.<sup>41</sup> The rights of all are enlarged and secured by wise restrictions upon the actions of each. The imposition of such restrictions is somewhat like pruning a fruit tree or trimming a vineyard; it means a loss of some fruit, but better fruit is produced so that there is a gain in the end.

**Argument that Government and Liberty are Antithetical Conceptions.**—The weakest point in the argument of the *laissez faire* advocates is the assumption that the state is necessarily hostile to freedom, that government and liberty represent antithetical ideas, that in proportion as the functions of government are multiplied the domain of individual liberty is restricted,—in short, that a maximum of government necessarily means a minimum of freedom. It is, as Ritchie remarks, like treating the two as if they formed the debit and credit sides of an account book.<sup>42</sup> In reality wisely organized and directed state action not only enlarges the moral, physical, and intellectual capacities of individuals, but increases their liberty of action by removing obstacles placed in their way by the strong and self-seeking, and thus frees them from the necessity of a perpetual struggle with those who would take advantage of their weakness. In this way the latent abilities

<sup>40</sup> Nevertheless, this is the attitude of most *laissez faire* theorists. Bruce Smith, for example, in his "Liberty and Liberalism," pp. 536-540, argues that a factory act is a "distinct instance of interference with property." "Every act of parliament," he says, "which in any way curtails the hours of labor or limits the number of workmen, involves an interference with the freedom of industry and renders less valuable the property invested in the business upon which the restrictions are imposed." It was a cardinal principle of the Benthamites or utilitarians that every law is an evil since law implies a necessary abridgment of liberty and every such infringement is followed by a sentiment of pain. Bentham, "Principles of Morals and Legislation," p. 94.

<sup>41</sup> Compare Hobhouse, "Social Evolution and Political Theory," p. 190. See also his "Liberalism," ch. 7.

<sup>42</sup> *Op. cit.*, p. 12. Compare in the same sense Leroy-Beaulieu, "L'Etat moderne et ses limites," p. 39; Laboulaye, "L'Etat et ses limites," p. VI; and Hobhouse, "Social Evolution and Political Theory," pp. 189 ff.

of the individual are liberated, and his opportunities increased.<sup>52</sup> It is manifestly wrong to assume that all restraint is an evil. In truth the state emancipates and promotes as well as restrains. The doctrine that governmental regulation tends to impair individual character by weakening the sense of individual initiative, self-reliance, and self-help, and by preventing the full and harmonious development of the faculties of the individual, has been greatly exaggerated by the *laissez faire* advocates. Many of the individualistic writers like Mill, Humboldt, and Spencer have, in fact, confused individuality with eccentricity, variety of living, and oddity of character, qualities which in themselves have nothing of value. Character is developed not through freedom alone, but quite as much through discipline and restraint.<sup>53</sup> It is not true that as the functions of government are extended the individual becomes weaker and less self-reliant. The most perfectly developed man is the social, not the natural man, for it is now generally admitted that the individual owes much of his character to the society of which he is a part.

#### **Individualistic Exaggeration of the Evils of State Regulation.**

—The chief fault of the individualists was that they exaggerated the evils of state regulation and minimized the advantages; they misunderstood the true nature and limits of liberty and had a mistaken idea of the relation of the individual to the society of which he is a part. In short, they overemphasized the importance of the man at the expense of the group; they treated him as if he were paramount and as if he determined the character of society when in fact it is society, as has been said, that determines in a large degree the character of the individual. Their doctrine rested on the assumption that the individual is largely a thing apart from the group of which he is a member, that he can be separated from society and treated as if his interests were entirely distinct from the interests of his fellow men. In reality, however, the

<sup>52</sup> Compare Ritchie, *op. cit.*, p. 50; Funck-Brentano, "La Politique," p. 34, and J. Brown, *op. cit.*, p. 54.

<sup>53</sup> "Mankind," says Burgess (*op. cit.*, vol. I, p. 88), "does not begin with liberty." Mankind "acquires liberty through civilization." It is quite true, as Burgess remarks, that the individual, both for his highest development and for the highest welfare of society, should be allowed to act freely within a certain sphere (*ibid.*, 176). But the state rather than the individual must be the judge of the limits of this sphere, and the experience of the past teaches that these limits cannot be drawn in accordance with the theories of individualism.

individual is more than a mere fraction of society ; he is the epitome of it ; he is a "bundle of relations" ; he is the "concise formula for the total of actions and attributes ; . . . out of relation to other things, he is literally nothing."<sup>54</sup> "Apart from his surroundings and relationships," says Professor Ritchie, "the individual is a mere abstraction, a logical ghost, a metaphorical specter, a mere negation."<sup>55</sup>

He cannot be conceived of as being uninfluenced by and exerting no influence upon those by whom he is surrounded. There are hardly any individual actions, said Lord Pembroke, which are purely "self-regarding,"<sup>56</sup> and Professor Ritchie goes to the length of expressing doubt whether even any thoughts of an individual can, strictly speaking, be "self-regarding" and therefore a matter of indifference to others.<sup>57</sup>

The much-admired individual, self-centered and self-contained, is, indeed, not very far from the strong and solitary wild beast. It is only in consequence of restrictions imposed by the state that he has any liberty at all beyond "the desolate freedom of the wild ass."<sup>58</sup>

**Argument Based on Past Mistakes of Government.**—The distrust, not to say hostility, of the *laissez faire* theorists to government because of the errors or abuses of particular governments in the past is childish. It is wholly wrong to take the position that because governments have made mistakes in the past, or because their agents have sometimes abused the powers intrusted to them, they cannot be trusted in the future ; or that because sumptuary laws are wrong, factory and sanitary legislation must be wrong as well ; or that because municipally constructed sewers have sometimes produced typhoid fever, cities in the future should leave the construction of their sewer systems to private enterprise ; or that because some poor laws have proved ineffective, the state should abandon altogether the policy of poor relief. The *laissez faire* writers never tired of parading and exaggerating the mistakes which governments have made in the past, and when they are all collected and put on exhibition, they constitute what to some is

<sup>54</sup> Montague, "Limits of Individual Liberty," p. 57.

<sup>55</sup> "Principles of State Interference," p. 11.

<sup>56</sup> "Liberty and Socialism," p. 97.

<sup>57</sup> *Op. cit.*, p. 97. Compare in the same sense Stephen, *op. cit.*, p. 138, and Barker, "Political Thought from Spencer to the Present Day," p. 59, who pronounces Mill's distinction between "self-regarding" and "other-regarding actions" to be false.

<sup>58</sup> Brown, *op. cit.*, p. 55.

indeed a strong indictment against state interference. "The state lives in a glass house," observed Huxley; "we see what it tries to do, and all its failures, partial or total, are made the most of. But private enterprise is sheltered under good opaque bricks and mortar. The public rarely knows what it tries to do and only hears of its failures when they are gross and patent to all the world."<sup>59</sup> We may well ask, with Lord Pembroke, "What would private enterprise look like if its mistakes and failures were collected, and pilloried in a similar manner?"<sup>60</sup> It may readily be admitted, observes an able writer, that government is weak and inefficient at times and obedient to private interests, but it does not follow from such an admission that government ought to be made "weaker, corrupter, and more inefficient by practicing the illogical doctrine of *laissez faire*."<sup>61</sup>

**Argument as to Superior Ability of the Individual to Judge for Himself.**—The *laissez faire* assumption that each individual knows his own interests better than society can know them, and is therefore the best judge of what is good for him, and if left to himself will follow those interests, is true only in a limited sense, and is still less true of classes. This was readily admitted by some individualist writers like Mill.<sup>62</sup> Sidgwick, an unusually fair and judicial writer, discussing this

<sup>59</sup> "Critiques and Addresses," p. 9.      <sup>60</sup> *Liberty and Socialism*, pp. 39-40.

<sup>61</sup> H. C. Adams, "Relation of the State to Industrial Action."

<sup>62</sup> "Essay on Liberty." Mill readily admitted that large classes of individuals must be excepted from his rule, and that it applied only to human beings "in the full maturity of their faculties"—an elastic phrase admitting of wide and varying interpretation. He confessed that "we may leave out of account those backward states of society in which the race may be considered in its non-age"; that despotism is "a legitimate mode of government for dealing with barbarians provided the end be their improvement"; that liberty has no application to any state of things anterior to the time when mankind have become "capable of being improved by free and equal discussion"; that "on any matter not self evident there are ninety-nine persons totally incapable of it, for one who is capable," etc. (*Essay on "Liberty,"* pp. 6, 31.) The line which he attempted to draw between "self regarding" and "social" acts is shadowy. As to this see my article on "Government and Liberty," in the *Yale Review* (1927), pp. 361 ff.; Stephen, "Liberty, Equality, and Fraternity," pp. 23, 138, a book which is devoted largely to answering Mill's arguments; Ritchie, *op. cit.*, pp. 11, 97, 118; Montague, *op. cit.*, pp. 57, 101; Gilchrist, *op. cit.*, p. 481.

Mill admitted that society has the right to punish drunkenness and similar social vices by public disapprobation or social intolerance, though he denied the right of the state to do so by law. But if, as Lord Pembroke remarked, law is

assumption, said : "But it seems to me very doubtful whether this can be granted ; since in some important respects the tendencies of social development seem to be rather in the opposite direction. As the appliances of life become more elaborate and complicated through the progress of invention, it is only according to the general law of division of labor to suppose that an average man's ability to judge of the adaptation of means to ends, even as regards the satisfaction of his everyday needs, is likely to become continually less."<sup>63</sup> If every man, observed the Belgian writer Laveleye, could see clearly and judge accurately of his own interests, rights, and duties, then pursue them, and do voluntarily what he ought to do and nothing that he ought not to do, the necessity for state intervention would disappear and we should enjoy the reign of liberty.<sup>64</sup> But the very point of the matter is that ignorant people cannot take precautions against dangers of which they are ignorant. No one lives in a badly drained house, drinks water polluted with sewage, or eats adulterated food because his interest leads him to do so, but generally because he is ignorant of the real character of the service or article which he uses or consumes, or because he cannot help himself.<sup>65</sup> Not only is the individual not always a competent judge of his own interests as an economic consumer, but in affairs of personal conduct he is often not to be trusted, particularly in matters relating to his health or safety or moral welfare. The truth is, society may be a better judge of a man's intellectual, moral, or physical needs than he is himself, and it may rightfully protect him from disease and danger against his own wishes and compel him to educate his children and to live a decent life.

**Present-Day Practice.**—The practice of all modern states is in

nothing but public opinion organized, defined, and equipped with force, what can be the objection to the substitution of state punishment in the place of that inflicted by unregulated public opinion, especially when the latter is visited upon the offender without a hearing, without proof, and may be with unrelenting cruelty.

<sup>63</sup> "Political Economy," p. 416. Compare also Mill, "Political Economy," vol. II, p. 537, who accepted the proposition that the consumer is a competent judge of commodities only with "numerous qualifications and exceptions." "The individual," he said, "is likely to be the best judge (though even this is not universally true) of the material objects produced for his use, but there are other things, which are chiefly useful as tending to raise the character of human beings, of the value of which the individual is incompetent to judge."

<sup>64</sup> *Op. cit.*, p. 24.    <sup>65</sup> Cf. Jevons, "The State in Its Relation to Labor," p. 43.

fact in harmony with this view. Few, if any, governments leave their citizens to find out for themselves what is healthful food; what physicians, surgeons, and druggists are qualified to practice; or what conditions of work are safe or dangerous. Most governments prescribe conditions under which certain dangerous occupations shall be carried on and refuse to permit them to be dispensed with even with the consent of those who would be endangered. All governments prohibit the exercise of certain professions of a quasi-public character except by persons who are able to show by examination or otherwise that they possess the requisite qualifications to insure the public against incompetent service. Evidence of competency is generally required of physicians, apothecaries, engineers, pilots, and even of barbers and plumbers. The state goes even further and undertakes to protect the individual against the consequences of his own acts, as where it limits the number of hours of labor in mines and factories, and prohibits women and children from engaging in certain injurious trades.

Much of the individualistic distrust of government is due, as Sir Frederick Pollock has pointed out, to the failure to distinguish between centralized government and local self-government.<sup>66</sup> A good deal of the objection which the individualists urge against government would be justified if it were centralized government that was complained of, but the objection is not always well founded when directed against local government, through local bodies directly under the eye and control of the people concerned. There is a vast difference, for example, between the "nationalization" and the "municipalization" of an industry, and there is an equal difference between national regulation of individual conduct and control by locally elected bodies. Manifestly the same objection cannot be urged against a local health regulation that would be applicable to a national quarantine law. Individualists, likewise, in their wholesale condemnation of government usually overlook the distinction between government popularly constituted and controlled, and bureaucratic, irresponsible government. It is difficult to see, in many cases, why a public utility owned by the government but under immediate control of the people of the locality, should be more feared and distrusted than one under the management

<sup>66</sup> "History of the Science of Politics," p. 123.

of a private company not amenable to public opinion or popular control.<sup>67</sup>

**Dangers of the *Laissez Faire* Policy.**—Spencer's doctrine of "negative regulation," which would limit the function of the state to redressing rather than preventing wrongs, would in many instances defeat the ends of the state. Thus, if the only security provided by the state against unsanitary plumbing, adulterated foods, incompetent practitioners of medicine or apothecaries, consisted of the right to sue the negligent plumber, the dishonest milk dealer, or the incompetent physician or druggist, instead of requiring plumbers to give bonds for the efficient discharge of their duties, physicians and druggists to pass examinations or otherwise furnish evidence of capacity, milk to be inspected, etc., the protection afforded would in many cases be inadequate, since the injury could not be redressed by a mere suit for damages. We agree with Sir Frederick Pollock that if it is negative and proper regulation to say that a man shall be punished for building his house in a city so that it falls into the street, it cannot be positive and improper regulation to say that he shall so build it that it will not appear to competent persons likely to fall into the city street. If it is purely negative regulation, and therefore proper, to punish a man for communicating an infectious disease by neglect of common precautions, it is not improper to require precautions, where the danger is known to exist, without waiting for somebody to be actually infected.<sup>68</sup> The individualists showed a distorted notion of liberty when they contended, as they did in effect, that the individual has a right to keep his premises in an unsanitary condition, to discharge his sewage where he will, to spread disease among his neighbors, to sell unwholesome food and drugs to whosoever will buy. If the state has the right and duty to protect by preventive measures the individual against violence and fraud, it has the same right and duty to protect him against acts

<sup>67</sup> Hobhouse in this connection emphasizes that the willingness of the people to accept the large extension of government control which has come about in recent years has been due in large measure to the growth of democratic government. In England in Bentham's day the government resembled a close and corrupt corporation; it was not distinguished for its efficiency; nor was it remarkable for an enlightened and disinterested view of public questions. Under the circumstances, public opinion hesitated to trust it with large powers of regulation or the conduct of industrial undertakings. *Op. cit.*, pp. 182, 191. The same situation existed in many other countries.

<sup>68</sup> "History of the Science of Politics," p. 125.

the consequences of which will be to inflict upon him injuries which cannot be redressed. There is, as Huxley said, no very great difference between the claim of an individual to go about threatening the lives of his neighbors with a pistol, and his claim to keep his premises in an unsanitary condition.<sup>69</sup> The same is true of the right and duty of the state to protect the individual against the dangers incident to modern industrial processes, such as those resulting from dangerous machinery, from bad ventilation, from unsanitary workshops, from fire, and even from unfair contracts of labor. The freedom of contract is a popular phrase, as has been aptly remarked, and to many it is a conclusive argument against state intervention in industrial matters; but when it refers to an agreement between a capitalist and an ignorant laborer who is at the mercy of his employer, there is no equality. The doctrine of freedom of contract has no sanctity in such cases. There is really no illegitimate interference with freedom of contract when the state undertakes to prescribe the conditions under which contracts shall be entered into between parties one of whom is really not on a free and equal footing with the other.

**The Truth in the *Laissez Faire* Philosophy.**—Nevertheless, when all is said against the *laissez faire* doctrine that can be said, it must be admitted that up to a certain point the weight of reason is on its side. The proposition that the individual is the best judge of what contributes to his own happiness and that he will prosper most under a system of liberty and free competition is in most cases a sound one and ought in practice, as Sidgwick and Cairnes have shown, to be deviated from only in special cases where there are strong empirical reasons for believing that the general assumption is not true. The doctrines of the individualists, while in many cases productive of harm, have not been entirely without a good effect. They have, as an able writer on economics has observed, "taught the people not to confound public morality with a state church, public security with police activity, or public wealth with government property."<sup>70</sup> They have emphasized the importance of the individual, the value of self-reliance and freedom, and the baneful effects of excessive state interference with industry and morality.<sup>71</sup> The principal fault with them has been their disposition to exaggerate the evils of state regulation and to minimize

<sup>69</sup> "Administrative Nihilism," in his "Critiques and Addresses," p. 10.

<sup>70</sup> Hadley, "Economics," p. 14.      <sup>71</sup> Compare Gilchrist, *op. cit.*, p. 484.

the advantages of wisely conceived and directed government intervention for the promotion of the collective interests of society. They have also frequently committed the error of failing to distinguish between those activities of the state which are in the nature of compulsion and those which are not, and of opposing both without discrimination. As was stated in the early part of this chapter, governments perform many functions which do not involve any element of coercion and hence impose no restrictions upon individual liberty; e.g., where a government engages in a business undertaking or operates a public utility enterprise.<sup>72</sup>

### III. THE SOCIALISTIC THEORY

**The Theory Explained.**—Directly opposed to the *Laissez Faire* theory of state functions is what, for lack of a more suitable term, we may call the socialistic theory, which contends for a maximum rather than a minimum of government.<sup>73</sup> The supporters of this theory, instead of distrusting the state and looking upon it as an evil whose functions should be restricted to the narrowest possible limits, regard it as a supreme and positive good; and hence its mission should include the promotion of the common economic, moral, and intellectual interests of the people. "A socialist," says Professor Ely, "is one who looks to society organized in the state for aid in bringing about a more perfect distribution of economic goods and an elevation of humanity: the individualist regards each man, not as his brother's keeper, but as his own, and desires every man to work out his own salvation, material and spiritual." It must not be understood, however, that the advocates of state socialism attach any less importance to individual freedom than do the *laissez faire* theorists. On the contrary, they regard it as all important, and differ from the latter only in holding that it can be better secured through state action than through the *laissez faire* policy, which permits competition.

**Varieties of Socialistic Conceptions.**—Those who advocate a

<sup>72</sup> This distinction is emphasized by Hobhouse in his "Social Evolution and Political Theory," p. 187.

<sup>73</sup> The term "socialistic" is here used without reference to its party connotations or the distinction between its shades of meaning. The French word *étatisme* more accurately indicates the sense I have in mind, although the English translation is unfortunately not an apt one. Some writers employ the term "state socialism"; others the term "collectivism."

wide extension of state activity may be grouped into several classes according to the nature and extent of the rôle which in their opinion the state should play. First, there are the extreme socialists, who advocate collective ownership and management of all industries, including land and capital, and the instruments of production and transportation.<sup>74</sup> Under such a system the state would become the principal owner of the wealth of the country, and there would be no private property except perhaps in things actually used by each individual.<sup>75</sup> Socialism of the present time, says an able writer on the subject, extends the state's intervention from those industrial undertakings it is best fitted to manage well to all undertakings of whatever character, and from the establishment of those securities for the full use of men's energies to the attempt to equalize in some way the results of their use of them. It may be less shortly described as aiming at the progressive nationalization of industries with a view to the progressive equalization of incomes.<sup>76</sup>

Some extreme socialists, indeed, would have the state guarantee work to everybody, lend them money without interest, furnish them with the implements of labor, build houses for them, give them farms,

<sup>74</sup> Cf. J. S. Mill, *Fortnightly Review*, April, 1879; Ely, "Socialism and Social Reform," p. 10; Rae, "Contemporary Socialism," pp. 379, 399; Hadley, "Economics," p. 15; Flint, "Socialism," p. 16. Kirkup, in his "Socialism in Theory and Practice" (p. 87), says: "A socialist society is one based on the system of public or collective ownership of the material instruments of production, democratic administration of the industries, and coöperative labor. See also Spargo, "Social Democracy Explained," ch. 1.

<sup>75</sup> Socialists, however, refuse to identify socialism with communism or with paternalism or state socialism. Communism, they maintain, stands for the holding of all things in common, while socialism emphasizes community of industry, production, and distribution only. Moreover, socialism, they say, does not mean a mere expansion of state functions such as is implied in the notion of paternalism. Socialists do not favor increasing governmental control merely for the sake of adding power to the government, but rather because they believe the individual would have more freedom than he now has. Their idea of the state is rather that of a fraternal coöperative commonwealth than a paternal state. The socialists of Germany, for example, were bitter opponents of the state socialism of Bismarck, which they asserted did not aim at the social and economic amelioration of the people, but rather at the extension of the power of the bureaucracy. In England, where democracy has made greater headway than in Germany, the distinction between socialism and what is called state socialism is not so sharp. The socialism of the English Fabian Society, for example, is in reality what is called state socialism.

<sup>76</sup> Rae, "Contemporary Socialism," p. 399.

strike bargains for them, provide pleasures for them, and in fact supply all their wants, economic, social, intellectual, or otherwise.<sup>77</sup> The socialists of the United States in their national platform demand that the machinery of production shall be owned by the people in common; that the national government shall obtain possession of the mines, railroads, canals, telegraphs, telephones, and other means of public transportation and communication, which shall be operated on a co-operative plan under the control of the federal government; that the municipal governments shall obtain possession of the local railways, ferries, waterworks, gas works, electric light plants, and all industries requiring municipal franchises to be operated on a co-operative plan under municipal control; that inventions shall be free to all; that education shall be free and compulsory; that the state shall assist poor school children with food, clothing, and books; and that employment on the public works shall be provided by the state for the unemployed.<sup>78</sup>

**Arguments for Socialism.**—The principal arguments advanced in favor of the socialistic state are the following: Under the present system of economic organization, the laboring man does not receive the fruits of his toil. A large part goes to reward capital or to pay for the services of those who direct and supervise the employment of labor, or to speculators and middlemen, and too little to those who are the real producers.<sup>79</sup> In short, society under the present system is organized in the interests of the rich and leads to grave inequalities of wealth and of opportunity. The means of production are being monopolized by the few who exploit the masses. The state should therefore take control of all the land and capital or means of production now being used for the exclusive benefit of the owning class. Under the individualistic régime industrial competition has become so fierce that the industrially weak have no chance of success and cannot survive in competition with the rich; they are growing relatively poorer and becoming more dependent upon the employing class, while the rich are growing richer and becoming more independent. The theory of socialism, it is argued, is founded on principle, of justice and right.

<sup>77</sup> Cf. Adams, "Relation of the State to Industrial Action," p. 475.

<sup>78</sup> For various socialistic programs, see the appendix to Kirkup's "History of Socialism." See also Hillquit, *op. cit.*, pp. 101 ff., as to the socialist program in general, and pp. 131 ff., as to the structure of the socialist state.

<sup>79</sup> Graham, "Socialism," p. 185.

The land and the mineral wealth contained therein should belong equally to all, not to a few. They are nature's gift to the human race, and ought not to be appropriated by the few any more than sunlight, air, or water. The same is true as regards the instruments of production.<sup>80</sup>

Competition under the present system not only leads to injustice and the crushing out of the small competitor, but it involves enormous economic waste and extravagance in the duplication of services. The system of unrestricted competition leads to lower wages, overproduction cheap goods, and unemployed workers. The only remedy for such a condition, say the socialists, is the abolition of competition and the substitution of the coöperative principle, under which equality of opportunity and equality of reward and economy of production will be secured. Under the socialistic régime, it is asserted, a higher type of individual character will also be produced and a larger degree of real freedom. Such industrial competition as we have to-day tends to beget materialism, unfairness, dishonesty, and a general lowering of the standard of individual character. Man is naturally weak and inclined to depravity, and the present system of economic individualism serves to accentuate his weakness and dishonesty. He needs, therefore, to be guided and aided by the state and protected against his own inherent frailties.

The doctrine of socialism, moreover, is defended as being in harmony with the organic theory of the nature of the state, which teaches that society is an organism, not a mere aggregation of individuals, that the good of all is paramount to that of a few, and that in order to secure the good of the greatest number the welfare of the individual as such must be subordinated to that of the many.

Finally, it is argued by the socialists that the state has already abolished competition in certain fields and introduced in its place the coöperative principle and has demonstrated its success as an industrial manager to the entire satisfaction of all candid and thoughtful men. Government management and control of the postal service, government coinage, government ownership and operation of railroads, telegraphs, mines, and other industries of a public nature in various countries have all demonstrated the advantages of collective management

<sup>80</sup> See Kirkup, "History of Socialism," p. 11; Hillquit, *op. cit.*, pp. 30 ff., and Spargo, *op. cit.*, ch. 2, on the arguments for socialism.

over private management, and thus fully justified the wisdom of the principle of socialism. Then why should the state not go further and occupy the entire field? Why should it not organize all labor as it has already done a part, and apportion the products of industry on the basis of each man's rightful share as the principles of justice require?<sup>81</sup> Collective ownership and management, it is maintained, is thoroughly democratic; indeed, socialism is the "economic complement of democracy"; it rests upon both ethical and altruistic principles and is the only system under which efficiency and justice in production can be secured and under which a full and harmonious development of individual character can be realized.<sup>82</sup>

**Arguments against Socialism : (1) The Economic Argument.**—Against the socialistic theory the chief argument advanced is the difficulty, if not the impossibility, of carrying out in practice the system which it advocates. The ideas of the extreme socialists are in many respects fantastic and would prove impracticable, both on account of reasons of an economic character and for others which are inherent in the constitution of human nature itself.

The socialistic theory, it is argued, starts from a false premise, when it maintains that private property in land and the instruments of production is not only wrong morally but also economically. To substitute generally collective ownership for private ownership, even if it were practicable, would tend to destroy one of the most powerful mainsprings of human endeavor and the chief incentive to individual effort and industry. Take away the right of the individual to acquire property and to accumulate the product for his own use, say the opponents of socialism, and you make an end of all progress by destroying the incentive to labor. The saying of Sir James F. Stephen that to try to make men equal by altering social arrangements is like trying to make the cards of equal value by shuffling the pack, is hardly less true of all efforts to make men equal in economic matters. Socialism, said Laveleye, rests on the principle that the able, industrious, and provident should share with the stupid, the idle, the improvident, whatever may be obtained as the reward of their energy and virtues.<sup>83</sup>

<sup>81</sup> See Graham, "Socialism," p. 11.

<sup>82</sup> Kirkup, "History of Socialism," pp. 10-12. For a summary of the good socialism has already accomplished, see Kirkup, ch. 11.

<sup>83</sup> *Contemporary Review*, April, 1883, p. 551. This, however, is denied by the advocates of socialism.

It is a system, says another critic, "which requires the state to do work it is unfit to do in order to invest the working classes with privileges they have no right to get."<sup>84</sup> The doctrine that each man should be rewarded according to his labor, if understood to mean simply work with one's hands without reference to capital or skill, cannot be defended upon any rational principle of justice.<sup>85</sup> Even if account should be taken of the difference in the productive capacity and hence of the value of the service of different workers, the practical difficulty in applying any such rule would be insurmountable under a system of socialism. On what principle would it be possible to distribute the rewards of industry to each worker according to his share in producing when he works side by side with machines, with unskilled and skilled laborers, and with directors and supervisors? Socialism, in the sense in which the term is generally used, will never be practicable until there is a fundamental change in human nature, to some of whose deepest principles it runs counter.<sup>86</sup>

**(2) The Political Argument.**—One error of the socialist is that he overestimates the state's capacity and efficiency. He assumes that every business managed by a joint stock concern can be as well managed by the state and ought therefore be taken over and operated by it in the interest of the public. But experience and reason are against such a view. Government in most cases is better fitted to restrain the evils of monopoly and regulate the conduct of a business which affects the public interest than it is to manage the business itself.<sup>87</sup> The more numerous and diverse the functions of government, the greater the difficulties. The business of a joint stock company is

<sup>84</sup> Rae, "Contemporary Socialism," p. 379.

<sup>85</sup> Cf. Graham, "Socialism," p. xxxiv.

<sup>86</sup> "A communist or an anarchist," said Lord Bryce, "who expects to reconstruct society, each in his own way, must be an optimist, strung up to so high a tension as to believe that in the new world he seeks to create, men will be renewed in the spirit of their minds and be themselves purer and nobler creatures." "Modern Democracies," vol. II, p. 589.

<sup>87</sup> The state monopolies of certain industries that have been created in some countries have frequently not been successful. For example in France, where the state monopolizes the manufacture of matches, gun powder, and tobacco, the poor quality of these articles is notorious and it has been the subject of much criticism by the French themselves. See an article by the late Professor Paul Leroy-Beaulieu entitled "Public Ownership in France," in the *North American Review* for March, 1913, pp. 295 ff.

usually limited to one or a few activities, while under a socialistic régime the business activities of the state would be legion. It goes without saying that there are some industries that can be better conducted by private management and to overcharge the government with the conduct of the whole complex volume of industrial activity in a modern society would lead to inefficiency, if not to a complete breakdown.<sup>88</sup> The problem of providing all the necessities of life for the people of a populous state, of managing the labor and distributing the products, would be a task which no government could perform satisfactorily.<sup>89</sup> Under a socialistic régime, moreover, nothing, it is argued by its opponents, would be produced except as it pleased those in authority. It would be necessary to persuade the state to produce many things that are now produced under private competition. Production would no longer be regulated by the law of supply and demand, but it would determine demand, contrary to every existing principle of political economy.<sup>90</sup> Besides, the calculations of the government would constantly be upset by various circumstances.<sup>91</sup> Everything would depend on the pleasure of the governors. A diminution in the quantity and quality of production might be expected to result from the withdrawal of the stimulus of private incentive. Government managers would be languid and without interest in the result, and laborers would be without incentive, from which there would result, says one writer, "a diminished rate of progress, decreased production of wealth, with, finally, in all probability, a diffused poverty, which, besides being an evil in itself, is one that threatens all the higher human interests."<sup>92</sup>

Finally, its opponents argue, socialism would involve, not an enlarge-

<sup>88</sup> Speaking of the inefficiency of government management, Rae observes that "the lassitude of the government stroke and the slow mechanism of a state department are unfriendly to an abundant production. The general slackening of industry and the extinction of those innumerable sources of active initiative which at present are so busy pushing out new and fruitful developments are too great a price to pay for the suppression of the evils of competition. To effect some economies in the use of capital we damage or destroy the forces by which capital is produced and really lose the power to save a penny." "Contemporary Socialism," p. 400.

<sup>89</sup> Compare Robertson in Mackay's "Plea for Liberty," ch. I.

<sup>90</sup> Graham, "Socialism," p. 162.

<sup>91</sup> McKechnie, "The State and the Individual," p. 188.

<sup>92</sup> Graham, *op. cit.*, p. 166.

ment, but a restriction of individual freedom, and a deterioration of individual character. This point was emphasized by Mill, Spencer, and others.<sup>93</sup> Under a socialistic régime society would have to be organized and controlled to some extent like an army. In the absence of all self-interest and incentive individuals would have to be disciplined and driven to the discharge of their duties, and in the place of freedom we should, according to some writers, have virtual slavery.<sup>94</sup> If all industry and commerce must be managed by a central authority which has to calculate and regulate everything, observes McKechnie, "it follows that all deviations from the appointed and expected routine on which these calls are based must be strenuously put down. No travesty of a healthy state, he concludes, is more deplorable than a practical socialism in the form of an absolute government directing with inquisitorial and irresistible sway every detail of human life."<sup>95</sup> Such are

<sup>93</sup> See Spencer's essay, "The Coming Slavery," and Mill, "Political Economy," vol. II, bk. V, ch. 11.

<sup>94</sup> This is the opinion of W. H. Mallock, a well-known English writer on socialism. See his "A Critical Examination of Socialism" (1907), especially chs. 7-9. Various practical and theoretical objections to the socialist state are discussed by Muir in his "Liberalism and Industry" (1921), pp. 60 ff. Compare also Bryce, "Modern Democracies," vol. II, pp. 589 ff., who dwells upon some of the practical political difficulties to be overcome by a socialistic state. He emphasizes in particular that the government of such a state would be a "gigantic bureaucracy," that the maintenance of justice and equality among the different classes of workers would be impossible, and that the powers of the state officials who control and direct the vast concerns of such an undertaking would necessarily be enormous.

<sup>95</sup> "The State and the Individual," pp. 177, 182-193; compare also the estimate of Sir Valentine May ("Democracy in Europe," Introduction, p. lxv), who, speaking of the socialistic doctrine, says: "The natural effect of such theories would be to repress the energies of mankind; and it is their avowed object to proscribe all the more elevated aims and faculties of individuals. The individual man is no more than a mechanical part of the whole community; he has no free will, no independence of thought or action. Every act of his life is prescribed for him. Individual liberty is surrendered to the state; everything that men prize most in life is to be taken out of their hands. Their religion, their education, the management of their families, their property, their industry, their earnings, are dictated by the ruling powers. Such a scheme of government, if practicable, would create a despotism exceeding any known in the history of the world." But obviously we have here a confusion of socialism and communism, a distinction which socialists are careful to insist upon. It is but fair to remark, therefore, that much of the criticism quoted above is inapplicable to the theories of socialism, though it might well be directed against those of communism.

some of the arguments that have been advanced by various writers against the theories of socialism as popularly understood.

**Examples of Socialistic Communities.**—The ideas of socialism in the form in which it has been described above have never been successfully carried out in any state. The Amana and Icarian communities in Iowa, the Shakers and the Harmony Society of Pennsylvania, and various others represent attempts to realize in practice communistic principles; but they all resulted in failure and left behind only "buried hopes and aspirations." These communities, says Rae, led to a slackening of industry and a deterioration of the general level of comfort.<sup>96</sup>

More recently a communistic régime on a large scale has been introduced in Russia, but it was admittedly not a success from the first and in 1921 it was modified and private management of industry and trading were restored to a limited extent. Based in part on hostility to capital, after a brief experience the Soviet government relented and invited foreign capitalists to enter Russia and engage in manufacturing under concessions. Whether the system under its modified form will endure or go the way of other communistic enterprises remains to be seen.

**Socialistic Functions.**—While socialism in its extreme form has never been attempted by any modern state, with the exception of Russia, all states perform various functions that are socialistic in character, some more than others; and one of the marked political tendencies of the time has been the drift in this direction.

The movement has been strongest on the continent of Europe, particularly in Germany, since the founding of the empire. There the state operates and controls many businesses that in America are left to private enterprise, and regulates many of the details of individual conduct that elsewhere are left uncontrolled by the state.<sup>97</sup> In various countries of Europe the state owns and operates railroads, telegraphs, mines, banks, and breweries; monopolizes the manufacture of certain commodities like brandy, tobacco, matches, and gunpowder; owns and operates or subsidizes theaters and opera houses; aids and encourages

<sup>96</sup> "Contemporary Socialism," p. 402.

<sup>97</sup> As to the progress of state socialism in Germany see Howe, "Socialized Germany" (1915), especially chs. 6-14; Roberts, "Monarchical Socialism in Germany" (1913), especially chs. 1-5; and Ogg, "Social Progress in Contemporary Europe" (1912), ch. 17.

literature, science, and art ; insures people against sickness, accidents, and old age ; and through the local governments manages many public utilities such as waterworks, gas and electric light plants, and street railways.<sup>98</sup>

<sup>98</sup> See Orth, "Social Democracy in Europe" (1913), ch. 10 ; Hunter, "Socialists at Work" (1912), chs. 6-9 ; and Ogg, *op. cit.*, ch. 18. Mr. Emil Davies, in his "State in Business" (p. 124), thus describes the extent to which the modern state serves and regulates the life of the individual to-day : "Eliminating the element of time in getting from place to place, it is already possible for a man in any civilized country to be brought into the world by a state doctor or midwife, reared in a state nursery, educated, clothed, and doctored at a state school, and, if needs be, fed at the cost of the community during his school days (except, in London, on holidays and days of public rejoicing). He can earn his living in government employment in any country. In most big towns he can live in a municipally owned house. In New Zealand the government will lend him money with which to buy a house, and it will also lend him, free of charge, the plans on which to construct it. If sick, he may be treated by a state doctor or in a state hospital. He may read at the state or municipal library until he goes blind, when the state will take him into a state blind asylum, or until he goes off his head, when he will be cared for in a state lunatic asylum. If unemployed, the state endeavours to find him work. In most of the towns in Italy or in Budapest he can buy his bread from the municipal bakery, and in other countries he can get municipally killed meat from a municipal butchery, and flavor it with government salt, after having cooked it over a fire made with state-mined coal. Or he can partake of his meal in a municipal restaurant, drinking municipally brewed beer, wine from the state vineyards, or state spirits. He then lights his state-made cigar with state-made matches, and can read a municipally produced daily newspaper. By this time, feeling more cheerful, he can draw some more money from his account at the state or municipal savings bank, and can visit the municipally owned race-course, where he gambles with the state or city, and can end up the evening at a state or municipally owned theatre. If he likes he can even take a municipal ballet girl out to supper, after which he may, if he feels so inclined, confess to a state-supported priest. Then, if he can afford it, he may go to recuperate at a state or municipal water spa or bath in France, Germany, or New Zealand, after having insured his life with a state insurance office and his house and furniture with the state fire insurance department. By this time, if a strong individualist, in despair at the encroachments of the state and municipality in every domain of life's activity, he can buy state gunpowder at the state shop and blow his brains out ; or if he likes, to blow out some one else's. The state, having brought him into the world and made him what he is, will finish the job and kill him, this being a monopoly jealously guarded by the state except in war-time. In Switzerland, Paris, or many another city, the municipality will bury him. There is no time to follow him beyond this stage, except to mention that the public trustee in most countries will probably look after the deceased's affairs much better than he did himself during his lifetime."

See also his "The Collectivist State" (1920), where he refers to the modern state or municipality as "coal owner, house proprietor, bread maker, meat retailer.

**State Socialism in Great Britain.**—In England, until recently, state socialism had made little headway, but in recent years a "profound change has come over the spirit of English politics" and the state is running fast in the direction of socialism. England is changing from the old trust in individualism and liberty to a new trust in state regulation, and from the French doctrine of *laissez faire* to the German doctrine of state socialism.<sup>99</sup> There is in England a tendency, says Hobhouse, to minimize the departure from precedent, but in reality the "breach with the past is great, and probably irreparable."<sup>100</sup> During the last few years the British parliament has enacted a large volume of social legislation, such as factory acts, health legislation, laws providing dwellings for the poor, employers' liability acts, workingmen's compensation acts, old age pension acts, laws for the feeding of school children, relief to the unemployed, etc., while the local governments have gone farther than those of any other country toward the municipalization of public service industries such as the water and light supply and the means of local transportation. Throughout Great Britain to-day the cities generally own and operate their own gas, electric light, and water systems; in many cases they own and manage the street railway utilities, and own public washhouses, libraries, music halls, etc. The state now operates not only the postal service but also the telegraph and to a large extent the telephone service, operates a parcels post system, conducts postal savings banks, and performs many other services that were formerly left to private enterprise. Most of the state intervention in England, however, has been in the interest of better moral and social conditions rather than for the promotion of economic interests. Most of it, in short, has been guided by ethical rather than by economic considerations.

In some of the British dominions, particularly in Australia and New Zealand, where private capital has been lacking, the activities of the state have been multiplied to an extent not equaled anywhere else in the world. There a large part of the tillable land is owned by

drug store keeper, undertaker, banker, pawnbroker, farmer, restaurant proprietor, general store keeper, and a thousand and one other things concerning practically every department of life." See also the somewhat similar treatise of Burns, "Government and Industry" (1921), especially ch. 8.

<sup>99</sup> Compare Rae, "Contemporary Socialism," p. 347.

<sup>100</sup> "Social Evolution and Political Theory" (1911), p. 174.

the state and rented to tenants; the coal mines and forests are likewise under state control; so are the railroad, telegraph, and telephone systems; there is also a government parcels post system and there are government savings banks. The state makes loans to farmers at low rates and constructs improved dwellings for workingmen. There is a system of state insurance, not only against death and old age, but against loss by fire. The government maintains labor bureaus and a system of compulsory arbitration in labour disputes; regulates the hours of labor in various occupations, and in some instances undertakes to regulate the wages of labor; constructs public works by direct labor rather than by contract; and, through the municipalities, generally owns and operates the public service industries. In short, in Australia and New Zealand the state approaches more nearly the socialistic ideal than anywhere else in the world. It is a vast landlord and employer; it engages in banking, farming, insurance, the express business, mining, and other industries. As to whether the good exceeds the evil, there is a wide difference of opinion.<sup>101</sup>

**State Socialism in the United States.**—In the United States, where for a long time the individualistic philosophy of government was dominant, there has in late years been a steady and increasing extension of state regulation and of state aid by both the national and the state governments.<sup>102</sup> This legislation has consisted largely of laws for the regulation of banking, insurance, transportation, and labor in factories, the establishment of systems of state insurance, regulation of the payment of wages, arbitration of labor disputes, extensive aid to education and research, laws for the preservation of the public health, for the relief of the poor and other dependent classes, for the construction of roads, etc.<sup>103</sup> Here as in other countries the *laissez faire* doctrine has been completely abandoned both in theory and in practice. During

<sup>101</sup> For a valuable study of the subject, see W. P. Reeves, "State Experiments in Australia," vol. II, and Siegfried, "Democracy in New Zealand" (1914), especially pt. III. The system is defended by Parsons in his "Story of New Zealand" and criticized by Fairfield in Mackay's "Plea for Liberty."

<sup>102</sup> As to the development of American sentiment in favor of state regulation see Merriam, "American Political Ideas" (1920), ch. 11.

<sup>103</sup> For an excellent summary of this legislation see Young, "The New American Government" (3d ed. 1933), chs. 10-15 and 26-29. Since the inauguration of President Franklin D. Roosevelt in 1933 the United States has moved still further in the direction of state socialism.

the World War state socialism received a tremendous impetus in all the belligerent countries through the assumption by governments of control over various industries, the operation of which was necessary to the successful prosecution of the war, the direct operation of certain industries, the fixing of wages and prices, and other activities.<sup>104</sup> Socialists claim (though their opponents deny) that the success achieved demonstrated the practicability of socialism and that what was forced upon the nations as a temporary expedient in time of stress and strain will be revived and carried to complete fruition as soon as the people fully realize what was done and how they have the power themselves to employ their collective force to their own advantage.<sup>105</sup>

#### IV. OBSERVATIONS AND CONCLUSIONS

**Boundary Line between Legitimate and Illegitimate Functions.**—Regarding the merits of the individualistic and socialistic theories of state functions, but one conclusion is possible—neither to-day represents the generally accepted view of the sphere and duty of the state or the actual practice. As Hurley aptly remarked, individualism and socialism are both out of court so far as the establishment of their claims is concerned. The state is neither a mere *gendarme* nor an *entrepreneur* of public felicity; neither a mere police contrivance for

<sup>104</sup> As to some aspects of this control see Lloyd, "The Machinery of State Controls," and Salter, "Allied Shipping Control."

In Italy, it may be remarked, state socialism has been in large measure abandoned under the régime of Mussolini. In that country there were numerous state-owned enterprises, including the railways, telegraphs, and telephones, and state monopolies of various kinds, including even such business as life insurance. They were not successful, and the operation of most of them resulted in large deficits to the state. Mussolini early announced his intention of abandoning them and of leaving them to private enterprise. In part this has now been done, and it is announced that the transformation will ultimately be carried out to full completion. See Cortesi, "A Year of Fascism in Italy," *Current History*, January, 1924, pp. 678 ff.

M. Vandervelde, leader of the Belgian Socialists, in an article entitled "Ten Years of Socialism in Europe" (*Foreign Affairs*, vol. III, 1925, p. 563), states that while there has been a reaction since the war against "state centralization, that is to say, the direct exploitation by the government of certain industries or services," socialization under its "new aspects," that is, under the form of autonomous, non-bureaucratic control, is increasing.

<sup>105</sup> Compare Hyndman, "The Future of Democracy," p. 203.

securing order nor an "epicurean engine for the manufacture of general comfort." The question of what are the functions of government, said Huxley, is met by the answer to the question "What ought we men in our corporate capacity to do, not only in the way of restraining that free individuality which is inconsistent with the existence of society, but in encouraging that free individuality which is essential to the evolution of the social organization?"<sup>106</sup> Manifestly, however, it is impossible to draw the line of demarcation between legitimate and illegitimate state interference as we would draw a boundary line on a map, because it is a line which must change with the altered conditions and needs of society.<sup>107</sup> No hard and fast rule, no fixed principle governing the division, can be laid down; no *a priori* solution of the question can be found. In the highly complex society of to-day it is difficult to see how any limit can be set to the extent to which under some circumstances the action of government may be carried. The question of where to draw the line between those things with which the state ought to interfere and those with which it ought not to interfere is one which must be left to be decided separately for each individual case.<sup>108</sup> Dogmatists have frequently undertaken on the basis of theoretical discussions of the nature of liberty, to lay down what things the state ought to do and what things it ought not to do—that is, how wide should be the province of government and how wide that of liberty; but all such attempts to solve the problem are as futile as the effort to discover the nature of light by discussions concerning the nature of darkness. If any general rule may be formulated, it must be deduced from a consideration of the question whether the purpose of state intervention in a given case is for the common good, whether the proposed action is likely to be effective, and, if so, whether it can be done without doing more harm than good. If a proposed act of intervention fulfills these conditions, no valid objection can be raised to it because it violates

<sup>106</sup> "Administrative Nihilism," in "Critiques and Addresses," p. 23.

<sup>107</sup> Compare Léon Say, "Municipal and State Socialism," p. 15. It is impossible, says Leroy-Beaulieu ("The Modern State"), to determine *a priori* the sphere of the state and that of the individual, because in life they run together and overlap each other.

<sup>108</sup> "It follows," says Cunningham ("Politics and Economics," p. 136), "that we cannot lay down a definite line restricting the functions of the state and making all else as of merely private and individual concern. The influence of the state permeates all our relations, even those of the personal kind."

some abstract principle of individual liberty or some doctrine of natural rights.

As Professor Hobhouse observes, we must be guided in determining what functions the state shall exercise, by a consideration of the question of how far the objects of social coöperation can be furthered by the methods of state intervention, and how far on the other hand the nature of the methods necessary will themselves conflict with the ends desired.<sup>109</sup> The kind of compulsion necessary, the degree of success with which compulsion can be applied, and the reflex consequences of its employment upon the general life of the community, will depend upon the composition of the community and the relation of the government to its subjects. The amount of state compulsion and intervention which may be necessary in a given case to protect society from the dangers within and without and to advance the common welfare must vary in accordance with the conditions and circumstances of each particular society. Mill very correctly remarked that the proper functions of government are not a fixed thing, but vary in different states of society. Stated in general terms, it should be the aim of the state to endeavor to secure the best conditions for the common life, or such conditions as are obtainable by the use of the public resources and governmental machinery, so far as these conditions are obtainable only by the use of compulsion.<sup>110</sup>

There are a multitude of cases, as Mill said, in which governments with general approbation assume powers and execute functions for which no reason can be assigned except the simple one that they conduce to the general convenience; and he might have added that no further reason ought to be required. It is manifest, as he pointed out, that the admitted functions of government embrace a much wider field than can easily be included within the ring fence of any restricted definition, and it is hardly possible to find any ground of justification

<sup>109</sup> "Social Evolution and Political Theory," pp. 188-189, 201. Compare also Seeley, *op. cit.*, p. 129.

<sup>110</sup> Compare Stephen, "Liberty, Equality, and Fraternity," p. 137, and Ritchie, "Studies in Political and Social Ethics," p. 63. Stephen laid down the following rule regarding the legitimacy of state compulsion: it is bad when the object aimed at is bad, when the object is good but the compulsion employed is not calculated to obtain it, and when the object is good and the compulsion effective but the expense is excessive. If the object is good, the compulsion effective, and the good achieved overbalances the inconvenience of the compulsion itself, the compulsion cannot be objectionable. *Ibid.*, p. 50.

common to them all except the comprehensive one of general expediency.<sup>111</sup>

In spite of our disagreement with the *laissez faire* theorists on so many points, all will probably agree with Mill when he says, "Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every human being which no government, be it that of one, of a few, or of many, ought to be permitted to overstep ; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively."<sup>112</sup> Mill's theory that this circle should include all that part which concerns only the life of the individual and which does not affect the interests of others, or which affects them only through the influence of moral example, is undoubtedly a safe proposition so far as the purely repressive sphere of the state is concerned ; but it does not take account of that larger liberty which comes from wisely directed state aid and guidance in the interests of social efficiency.

**Points of General Agreement.**—Upon one point, most men are now agreed ; namely, that the state has a higher mission than the mere police duty of maintaining peace, order, and security among individuals, and that it ought to do more for its citizens than merely prevent them from robbing or murdering one another. Nothing, as Huxley observed, "can be less justifiable than the dogmatic assertion that state interference beyond the limits of home and foreign protection must under all circumstances do harm."<sup>113</sup> The state does not do all that it can or ought to do when it merely protects the individual from violence and fraud and leaves him alone to struggle against ruinous conditions which only the state is capable of removing. In the beginning of human societies, as Leroy-Beaulieu pointed out, the principal function of the state is the maintenance of defense against

<sup>111</sup> "Political Economy," vol. II, pp. 391, 392.

<sup>112</sup> *Ibid.*, p. 568 : see also his essay on "Liberty."

<sup>113</sup> "Administrative Nihilism," in his "Critiques and Addresses," p. 10. "The business of the state," said Thomas Hill Green, "is not merely the business of a policeman, of arresting wrong-doers, or of ruthlessly enforcing contracts, but of providing for men an equal chance, as far as possible, of realizing what is best in their intellectual and moral natures."

outside aggression and the preservation of domestic order within ; but in proportion as society emancipates itself and increases in population and complexity, as it passes from the savage to the barbarous and from the barbarous to the civilized stage, a wider duty than that simply of a policeman is laid upon it, namely, that of contributing to the perfection of the national life, to the development of the nation's wealth and well-being, its morality, and its intelligence.<sup>114</sup>

**Duty of the State.**—It is legitimate intervention for the state to go in social reform as far as it goes in judicial administration, namely, to secure for every man as effectively as possible those essentials of rational humane living which are really every man's right, because without them he would be maimed, mutilated, deformed, and incapable of living a normal life. The same reason, says a well-known writer, which justified the state at first in protecting person and property against violation, justified it yesterday in abolishing slavery, justifies it to-day in abolishing ignorance, and will justify it to-morrow in abolishing other degrading conditions of life.<sup>115</sup>

It is an equally legitimate duty, we believe, for the state to encourage certain of those higher activities of life, like science, literature, and art, which contribute to the civilization of a nation, when they cannot be had without such aid or encouragement. A nation which does not produce and does not care for such things can have, as Lecky truly remarked, only an inferior and imperfect civilization.<sup>116</sup> The support and encouragement of art adds to the dignity of a nation and to the education of its people ; and most states in fact appropriate money for maintaining picture galleries, museums, and art schools. It was a wise observation of Edmund Burke that the state "is not a partnership in things subservient only to the gross animal existence

<sup>114</sup> "The Modern State," ch. 5. "We are often told," says Cunningham, in his "Politics and Economics" (p. 120), "that the business of the state is to protect person and property, and those who announce this view think they have found a formula which defines the range of state action pretty closely,.....but it is idle to contend that the privre function of a state is to defend person and property from *physical* agents ; the state is expected to intervene to protect life and property from human agents and to control human conduct, but not always or generally to prevent and relieve misery which has accrued from physical conditions unless these physical conditions are more or less under human control."

<sup>115</sup> Cf. Rae, "Contemporary Socialism," pp. 396-397.

<sup>116</sup> "Democracy and Liberty," vol. I, p. 275. Cf. also Pollock, "History of the Science of Politics," p. 125.

of a temporary and perishable nature," but "a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection." Besides administering justice and protecting life and property, it is the plain duty of the state to see to it that the social and economic conditions under which the individual is compelled to live are such that he can develop his abilities, make the most of the faculties with which he is endowed by nature, and thus realize fully the ends of his existence.

It is the duty of the state to enforce contracts, but it may also be its duty to prescribe the conditions under which contracts in certain cases shall be valid and entitled to the protection of the state, especially when one of the contracting parties is really not free. The state ought to regulate or supervise the conduct of industries which are natural monopolies ; but it may also be the duty of the state to take a business out of the hands of private individuals and operate it itself as a means of protecting society from inefficient service and ruinous prices. The state ought to preserve for society the obvious advantages of industrial competition ; and if free competition becomes impossible through the policy of *laissez faire* the state ought to intervene and protect society against the evils of private monopoly. And experience has abundantly shown that the policy of *laissez faire* will not secure industrial freedom nor insure equality of economic opportunity in the highly complex societies of the present day.

Free competition under modern conditions is not always a beneficent social or economic principle. When it forces the level of trade down to that which characterizes the worst men in it, when it leads to inequality of opportunity instead of equality, when it tends to actual monopoly and the destruction of healthful competition, and when it results in poor economic service, it is no longer a good but an evil. The state has the undoubted power as well as the duty to determine the character of competitive action so as to render it possible for the best men instead of the worst to set the fashion and enable society to adjust its productive processes to the best possible form of organization.

**The Principle of Freedom.**—Nevertheless, the presumption may in general be resolved against state interference, whether it be in the form of prohibition, regulation, or government operation. There is a general agreement that freedom should be the rule and interference the exception ; and that those who advocate state inter-

ference should discharge the burden of proving the necessity for the proposed innovation, or, as Mill says, the "onus of making out a case."<sup>117</sup> Huxley's saying that an excess of abstention offers much less peril than an excess of intrusion is probably a safe principle to follow. It is admitted by nearly all writers that the state should not ordinarily undertake to do for society what individuals themselves can do as well, or better, or what when done by them is productive of better results for all concerned. The advantages which result from leaving the individual free from restriction in economic matters so long as the rights and interests of others are not impaired by leaving him alone, are manifest. The liberty of every member of the state as a man, said Kant, is the first principle in the constitution of a rational commonwealth. Most acts of state intervention necessarily involve a certain restriction of liberty upon some class, and are justifiable only when they secure the rights of a more numerous class. They are certainly unjust if they hurt the one class without benefiting the other.

**Impossibility of *Laissez faire***—In the present state of economic and social development of the world, however, the policy of *laissez faire* is impossible, much more so than it was in the days of Adam Smith and Bentham. Profound economic, social, and political changes have combined to create a powerful reaction against the individualism of three quarters of a century ago.<sup>118</sup>

Since the middle of the nineteenth century there has been a remarkable tendency among civilized states to push their lines farther into domains heretofore left to individual freedom. It should be remembered, however, that the so-called state interference of the present century differs largely from that of the preceding centuries in being legislative rather than administrative in its nature. As Professor Seeley observes, the nineteenth-century state may well be called the "legislative state."<sup>119</sup> As pointed out above, state intervention of the present day

<sup>117</sup> "Political Economy," vol. II, pp. 561, 569; Bruce Smith, "Liberty and Liberalism," p. 448. "*Laissez faire*, as a practical rule," says Cairnes ("Political Economy," p. 251), "is incomparably the safer guide and ought not to be departed from so long as there remains any doubt as to the wisdom of the proposed departure."

<sup>118</sup> See Michel, "L'idée de l'état," bk. V, ch. 2, on the "Dissolution of Individualism," where the reaction against individualism and the progress of state socialism are fully discussed. <sup>119</sup> "Introduction to Political Science," p. 146.

differs also from that of the eighteenth century in that it is exercised by governments which are democratically constituted and controlled.

During the last century the province of executive government in which we still retain our traditional hostility has been greatly narrowed. But the revised statutes of every modern state, already abnormally large, continue to grow in bulk with each passing year. Whether life under a future edition will, as Herbert Spencer maintained, be a burden and the status of the individual that of a slave, is a question which need not worry us. We agree with Jevons that, notwithstanding the multiplicity of statutes under which the modern individual must live, he is an infinitely freer and nobler creature than the wildest savage who knows no restraints but those of nature, yet who is always under the physical despotism of want.<sup>120</sup> Liberty, like everything else, is good or bad according to the use which is made of it. As the late Mr. Justice James Fitzjames Stephen aptly remarked, the question whether liberty is a good or a bad thing is as irrational as the question whether fire is a good or a bad thing. It is both good and bad according to time, place, and circumstance, and the complete answer to the question as to what are the cases in which it is good and in which it is bad would involve not merely a universal history of mankind, but a complete solution of the problems which such a history would offer.<sup>121</sup> It is not, as Benjamin Constant maintained, the end of all human associations,<sup>122</sup> but is merely a means for the realization of the fullness of individual life. To treat it as an end in itself is to misconceive the whole problem. It is, therefore, beneficial only in so far as it helps man to attain that other freedom which is an end in itself, the end of all social organization. On the whole, it may be doubted whether mankind has suffered more in the past from an excess of government than from an excess of liberty.<sup>123</sup>

<sup>120</sup> "The State in Relation to Labor," p. 14.

<sup>121</sup> "Liberty, Equality, and Fraternity," p. 48.

<sup>122</sup> "Principes de politique" (1861), p. 145.

<sup>123</sup> The student who is interested in the notions that have prevailed in different ages and countries in regard to liberty, the practice of states, the origin and development and kinds of liberty, will find a wealth of material in the monumental work of professor James McKinnon, "A History of Modern Liberty," 3 vols., 1906.

## CHAPTER XVIII

### CONSTITUTIONS

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#### I. NATURE, NECESSITY, AND ORIGIN OF CONSTITUTIONS

**The Term "Constitution."**—The term "constitution" when applied to the state may connote both a physical and a legal conception.

In the former sense it has reference to the totality of constituent elements which enter into the physical make-up of the state : land, people, institutions, government machinery, etc. In this sense the term is used somewhat as it is in the natural sciences as when we speak of the constitution of an animal or other physical organism. In the latter sense it has reference to a legal instrument,—an "instrument of evidence," it has been called—a fundamental statute or charter, a document or collection of documents, which embodies the more essential parts of the organic public law of the state. It is, said Jameson, an expression or embodiment in technical language of certain formulas addressed by the state to its citizens or subjects.<sup>1</sup>

Like other terms in political science, it has been variously defined by different writers according to the varying conceptions which they hold as to what a constitution should be. Considering the variety of constitutions which are now in existence and which have existed in the past, it is not easy to formulate a concise definition which would describe equally the character of all of them. There is, however, a fairly general agreement among modern jurists as to the essentials of a constitution, although the actual practice is not always in harmony with the conceptions of the jurists.

**Definitions of the Constitution.**—The following definitions by authoritative writers are offered as examples of efforts to state in general terms the character and function of a constitution.

"By the constitution of a state," said Sir James McIntosh, "I mean the body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects."<sup>2</sup> "The term Constitution," said George Cornwall Lewis, "signifies the arrangement and distribution of the sovereign power in the community, or the form of the government."<sup>3</sup> Judge Cooley, an eminent American jurist, defined a constitution as "the fundamental law of the state, containing the principles upon which government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided and the manner in which it is to be exercised." "Perhaps an equally complete and accurate definition," he continued, "would be

<sup>1</sup> "The Constitutional Convention," p. 66.

<sup>2</sup> "Law of Nature and of Nations," p. 65.

<sup>3</sup> "Use and Abuse of Political Terms," p. 20.

the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."<sup>4</sup> Charles Borgeaud, a high Swiss authority on the subject of constitutions as instruments of government, says: "A constitution is the fundamental law according to which the government of a state is organized and agreeably to which the relations of individuals or moral persons to the community are determined. It may be a written instrument, a precise text or series of texts enacted at a given time by a sovereign power; or it may be the more or less definite result of a series of legislative acts, ordinances, judicial decisions, precedents, and customs of diverse origin and of unequal value and importance."<sup>5</sup>

An eminent German writer on political science, Georg Jellinek, defined a constitution as the body of "juridical rules which determine the supreme organs of the state, which prescribes their mode of creation, their mutual relation, their sphere of action and, finally, the fundamental place of each of them in their relation to the state."<sup>6</sup>

"A constitution in the American sense of the word," said Mr. Justice Miller, of the United States Supreme Court, "is a written instrument by which the fundamental powers of government are established, limited, and defined, and by which those powers are distributed among several departments for their more safe and useful exercise for the benefit of the body politic."<sup>7</sup>

A distinction is sometimes made between the *real* and the *formal* constitution, the one being the actual historical constitution which has evolved under the operation of political and social forces,—the living, working constitution which the people obey, while the other is the constitution in theory, the lawyers' constitution,—the "literary" constitution, as the late President Wilson called it, —the actual legal instrument stripped of all its conventions and historical addenda. The real constitution is the formal constitution modified, expanded, and adapted to new conditions by custom and extra-legal practices.<sup>8</sup>

The constitution is sometimes referred to as a sort of ideal embody-

<sup>4</sup> "Constitutional Limitations" (7th ed.), p. 4.

<sup>5</sup> "The Origin of Written Constitutions," *Political Science Quarterly*, vol. VII, p. 613.     "*Recht des modernen Staates*" (French ed.), vol. II, p. 170.

<sup>6</sup> See also a definition by the Supreme Court itself, in the case of *Van Horn v. Dorrance*, 2 Dall. 304.

<sup>8</sup> Compare Mulford, "The Nation," p. 144; Brownson, "The American Republic," p. 218; and Hurd, "Law of Freedom and Bondage," vol. I, p. 296.

ing high principles of public morality and justice, as when we speak of the "spirit" of the constitution, meaning some supposed rule or principle to which in our judgment the formal constitution ought to conform.<sup>9</sup>

**Necessity of a Constitution.**—Is it possible to conceive of a state, fully organized and performing its normal functions, and yet without a constitution? The answer depends upon our conception of what a constitution is. Jellinek declared that a constitution is a necessity and that every state must and does in fact possess one. It is indispensable, he said, even for states in which an arbitrary régime, in the ancient sense, prevails, or in which a system of despotism exists. A state without a constitution, he added, would not be a state but a régime of anarchy.<sup>10</sup>

This is not saying that a state may not exist and perform for a long period of time the usual functions of a state without having a formal written constitution. In fact the French state, to cite a notable example, existed for a thousand years before it had a constitution in the modern sense, that is, a formal written instrument embodying in definite terms the fundamental organic law of the state. Indeed, as will be pointed out later, some writers, among them, French, maintain that France is still without a constitution in the modern sense. Likewise there was a long period during which England may be said to have been, strictly speaking, without a constitution. Thus Lecky spoke of the English constitution at the time of the Restoration of 1660 as being "still unformed." But if we interpret the term in the larger sense of being an established body of fundamental rules, principles, maxims, or traditions, even though unembodied in formal documents or charters, according to which the state is organized and its powers exercised, both the French and the English states possessed at least rudimentary constitutions in the seventeenth century.

<sup>9</sup> Compare Mill's reference to the principles of "constitutional morality," which he said, "are of no less practical moment than those relating to the constitution itself" "Representative Government," People's Edition, 1<sup>st</sup>7, p. 92.

<sup>10</sup> *Op. cit.*, p. 1<sup>st</sup>9. Compare also Schulze, "Deutsches Staatsrecht," vol. I, p. 10, who remarked that every community entitled to the name of state must have a constitution, i.e., a collection of norms by which the legal relations "between the government and its subjects is determined and in accordance with which the power of the state is exercised. A state without a constitution he said, is unthinkable.

**The French Constitution Prior to the Revolution.**—In France, beginning as early as the fourteenth century, there was developed in the hands of the jurists, particularly those of the natural law school, the distinction between the fundamental laws of the kingdom (*les lois fondamentales du royaume*) and the laws of the king (*les lois du roi*). The former embraced certain established maxims, traditions, and principles which had grown up in the course of centuries and which kings themselves admitted could not be abrogated or altered by them without the assent of the states general.<sup>11</sup> By their prescriptions kings were bound in the exercise of their supreme power of legislation somewhat as modern legislatures are bound by the terms of written constitutions. "Les lois fondamentales," said Loyseau, an eminent French jurist of the sixteenth century, "sont pour le pouvoir royal des limites sérieuses." Among such fundamental principles were the following: the king could not levy new taxes without the assent of the states-general; he could not modify the salic law of succession to the throne; he could not alienate the territorial domain of the state; and his power of legislation was declared to be limited by the law of nature, by the law of God, and by *les lois constitutives fondamentales de l'Etat*; if he violated these laws, his subjects were not bound to obey him; no laws had any validity until they were registered by the *parlement* (a judicial rather than a legislative body); every citizen had a right to be judged by his peers; no man could be imprisoned except by order of a judge; and the nation had a right to be convoked in national assembly to deliberate upon the needs of the state.

Thus it came to pass that France had a collection of laws, supposedly imposed by God or by nature or developed by custom and recognized by her kings, which the jurists distinguished from *les lois ordinaires* and which they variously described as *les lois fondamentales, constitutives, constitutionnelles, primordiales, immuables, permanentes, intransférables, indestructibles*, etc. These in their totality formed a rudimentary, unwritten constitution. Historians and jurists expounded

<sup>11</sup> This distinction between the fundamental laws of the kingdom which the king could not alter or abrogate, except with the assent of the states general, and the laws of the king, which he could freely alter or abrogate at will, was frequently affirmed by the estates, both provincial and general, and the King, speaking through his chancellor on April 13, 1771, affirmed his respect for the former laws, which he said were "graven in the hearts of all good Frenchmen." Le G. a. i. e., "Les lois fondamentales" (1907), p. 278.

and commented upon them. They were not always observed by kings, however, and in the seventeenth century they fell almost into desuetude as the monarchy became more and more absolute.<sup>12</sup> When the states-general finally met in 1789 practically all the *cahiers* that were laid before it placed at the head of their lists of grievances the lack of a constitution. Sieyès, the deputy who led the fight for the adoption of a written constitution, proclaimed the modern doctrine when he asserted that the constitution must emanate from the nation: that it could be framed only by an assembly having a special mandate from the people; and that the legislative power is limited by the constituent power.<sup>13</sup>

In a somewhat analogous manner the early English constitution was developed. The parallelism, however, ended with the outbreak of the French Revolution, when the French reduced their constitution to written form, whereas the English continued to rely upon custom, legislation, and judicial interpretation as the processes for the development of theirs.

**Origin of Written Constitutions.**—While examples of written constitutions in the modern sense hardly antedate the eighteenth century, constitutions were not unknown to the ancients. Thus Athens is said to have had eleven "constitutions" between 624 B.C. and 404 B.C.: Aristotle is credited with having collected and described a large number of "constitutions," and in his treatise on "Politics" he discussed "constitutional government," inquired into the "best constitution," and himself defined a "constitution" as follows: "A constitution is the organization of offices in a state, and determines what is to be the governing body and what is the end of the community."<sup>14</sup> The Romans likewise distinguished between constitutional law and ordinary law, between the constituent power and the legislative power:

<sup>12</sup> As to the nature of these laws and the distinction between them and ordinary laws see Bodin "Six livres de la république," bk. I, chs. 5 and 8; bk. V, ch. 1; Picot, "Hist. gen. des états-généraux," vol. III, pp. 92 ff., and vol. IV, p. 484; Duguit, "L'état," vol. I, p. 492; also his "Droit const." (1911), vol. II, p. 516; Esmein, "Droit const." (1909), pp. 50 ff., and an article entitled "Constitutional Theories in France," by J. H. Reed in the *Political Science Quarterly*, Dec., 1906 pp. 650 ff. An excellent discussion of the whole subject will be found in Lemaire "Les lois fondamentales" (1907).

<sup>13</sup> Quoted by Esmein, *op. cit.*, p. 506.

<sup>14</sup> Jowett's translation (Oxford ed., 1908), pp. 147, 163, 167.

and they employed the technical phrase "rem publicam constituere" when referring to the exercise of the constituent power.<sup>15</sup>

But however clear may have been the idea of a constitution in the minds of the ancients, they never went to the length of embodying their constitutional principles in a fundamental statute or charter having an authority superior to that of other laws. During the Middle Ages the rights of cities, corporations, the church, and the feudal lords were sometimes defined and set forth in written charters which had something of the character of contracts. From this it was but a short step to concessions from the king to his subjects, generally consisting of the recognition of certain rights which were defined in written instruments and which when once made tended to be regarded as contracts between him and the people. In a sense these charters may be regarded as the precursors of the first written constitutions.

**Prototypes of Modern Written Constitutions.**—In the sixteenth century the notion of "fundamental law"—*lex fundamentalis*—appeared in the writings, especially, of the monarchomachs, i.e., the concept of a body of law superior in authority and dignity to ordinary law. As we have seen, this notion took deep root in France and it gained a foothold in England and other countries. Thus James I of England in one of his addresses spoke of the "fundamental laws" as being divine and of himself as being their defender.<sup>16</sup> During the reign of his son, Charles I, the idea played an important rôle in the parliamentary struggles, and the Count of Strafford was condemned for endeavoring to subvert these ancient and fundamental laws.<sup>17</sup> The term "constitution" was occasionally employed also to designate important English statutes.

Thus the famous statutes of Henry II concerning the relations between the king and clergy were styled the "Constitutions of Clarendon."<sup>18</sup> The term was also used in the second and third charters

<sup>15</sup> Compare Mommsen, "Abriss des römischen Staatsrechts" (1893), p. 88, Jellinek, *op. cit.* (French ed.), vol. II, p. 171.

<sup>16</sup> Prothero, "Select Statutes and Other Constitutional Documents" (1894), p. 400.

<sup>17</sup> Gardiner, "The Constitutional Documents of the Puritan Revolution," p. 85.

<sup>18</sup> Stubbs, "Select Charters," pp. 137-140.

granted early in the seventeenth century to the Virginia company;<sup>19</sup> in William Penn's "Frame of Government for Pennsylvania in 1682; in Sidney's work on government written during the reign of Charles II; in the political works of James Harrington; and in various other places. Among the more immediate precursors of the modern written constitution may be mentioned the charters granted to the English colonies in America; the celebrated "Agreement of the People," drawn up by Cromwell's soldiers in 1647; "The Instrument of Government" of the Protectorate, promulgated by Cromwell in 1653; "the Fundamental Orders" of the Colony of Connecticut (1639); and the various Declarations and Resolves drawn up by the American colonies prior to the Revolution.<sup>20</sup> In the latter part of the seventeenth century the term gradually came to signify the more fundamental laws and especially those which related to the organization of the government.<sup>21</sup> The modern use of the term was finally established when it was applied to the new instruments of government adopted by the American colonies after their separation from Great Britain in the latter part of the eighteenth century. Since then the term has had a definite and well-understood meaning, namely, the body of fundamental law, either written or customary, which determines the organization of the state.

**The First Written Constitutions.**—The era in which the first American constitutions were framed and adopted (1776-1789) was, said Seeley, a period which is "preëminently the constitutional period of the modern world."<sup>22</sup> Of these first American constitutions, Lord

<sup>19</sup> Preston, "Documents Illustrative of American History," p. 33.

<sup>20</sup> Compare Borgeaud, "Adoption and Amendment of Constitutions," ch. 1, also an article by the same author in the *Political Science Quarterly*, vol. VII, pp. 614 ff. See also Bryce, "American Commonwealth," ch. 35. The text of the "Agreement of the People" may be found in Gardiner, "Constitutional Documents," pp. 207 ff. Jellinek remarks that in this famous document we find the first attempt to give England a written constitution, and that it contained the first recognition of a fundamental feature of the American constitution: the distinction between the rights of the legislature and the rights of the people. *Op. cit.*, vol. II, p. 177. The "Instrument of Government" conformed more nearly still to a modern constitution; it was the only written constitution which England has ever had. Text in Gardiner, *op. cit.*, pp. 314 ff. It contained 42 articles, one of which declared that any laws contrary to its provisions should be considered null and void. Esmein (*op. cit.*, p. 515) says of it that it was the prototype of the constitution of the United States. See also Frederic Harrison, "Oliver Cromwell," p. 65.

<sup>21</sup> Compare Macy, "The English Constitution," p. 452.

<sup>22</sup> "Introduction to Political Science," p. 209.

Bryce said, "they are among the greatest contributions ever made to politics as a practical art ; and they are also the most complete and definite concrete expressions ever given to the fundamental principles of democracy."<sup>23</sup> The American example was speedily followed by France, whose first written constitution was promulgated in September, 1791. The German states soon followed, and between 1814 and 1829 many of them adopted written constitutions,<sup>24</sup> though Prussia and some others did not imitate their example until the middle of the century. Other European states likewise adopted written constitutions, most of them before the middle of the nineteenth century : Spain in 1812, Norway in 1814 (still in force), Denmark and the Netherlands in 1815, Portugal in 1822, Belgium in 1831, Italy and Switzerland in 1848, Austria in 1861, and Sweden in 1866. Before the end of the century every European state except Great Britain, Hungary, and Württemberg had a written constitution of some sort.<sup>25</sup>

## II. KINDS OF CONSTITUTIONS

**Constitutions Classified.**—Considered with reference to the degree of popular participation in the government which they allow, constitutions have been classified by various writers as "free," "democratic," "aristocratic," etc. Considered as instruments of evidence, they have been classified, first, as cumulative or evolved; and second, as conventional or enacted.<sup>26</sup> To the first class belong those which have their origin mainly in custom, and which consist for the most part of accumulated usages, common law principles, decisions of courts, etc. They are the product of historical evolution and growth rather than of deliberate and formal enactment. They have no conscious starting point, are not "struck off" at a specific date, and they change by slow and gradual accretion rather than by formal legal processes. To the

<sup>23</sup> "Modern Democracies," vol. II, p. 10.

<sup>24</sup> See the list in Bluntschli, "Theory of the State," p. 417.

<sup>25</sup> More than 300 different constitutions are said to have been promulgated in Europe between the years 1800 and 1880. Morley, "Democracy and Reaction," quoted by Willoughby and Rogers, *op. cit.*, p. 10.

<sup>26</sup> Jameson, "The Constitutional Convention," sec. 72; Lieber, "Civil Liberty and Self-government," p. 166; Ordnour, "Constitutional Legislation," p. 207. See also Borgeaud, "Adoption and Amendment of Constitutions," p. 43; Lowell, "Government of England," vol. I, p. 4.

second class belong those which have been formulated usually by a constituent assembly or promulgated by a king.<sup>27</sup>

**Written and Unwritten Constitutions.**—The distinction between evolved and enacted constitutions coincides roughly with the old and commonly observed distinction between unwritten and written constitutions. A so-called unwritten constitution is one in which most, but not all, of the prescriptions have never been reduced to writing and formally embodied in a document or collection of documents. It consists largely of a mass of customs, usages, and judicial decisions together with a smaller body of statutory enactments of a fundamental character, usually bearing different dates. Constitutions of this class are not struck off at once by a constituent assembly or other body; they are good illustrations of Sir James McIntosh's dictum that constitutions grow instead of being made.

A written constitution, on the contrary, is one in which most of the provisions are embodied in a single formal written instrument or instruments. It is a work of conscious art and the result of a deliberate effort to lay down a body of fundamental principles under which government shall be organized and conducted.<sup>28</sup> The distinction between a written and an unwritten constitution corresponds roughly

<sup>27</sup> This corresponds roughly to Borgeaud's classification as (1) compacts and royal charters and (2) popular constitutions. *Op. cit.*, p. 43.

<sup>28</sup> "An unwritten constitution," says Jameson, "is made up largely of customs and judicial decisions, the former more or less evanescent and intangible, since in a written form they exist only in the unofficial collections or commentaries of publicists or lawyers." *Op. cit.*, p. 76. "It is a record by more or less competent observers of fundamental changes which have occurred in the structure, principles, or guarantees of the constitution considered as a fact. These changes are not made, but work themselves out under the operation of determinate social and political forces. They do not evolve themselves *per saltum*, as in written constitutions, but gradually and continuously. They who transcribe such a constitution merely watch, pen in hand, the play of the producing forces and note result, as they are achieved. These results become parts of the constitution as a fact, and the delineation of them, made by the observer, a part of the unwritten constitution considered as an instrument of evidence." *Ibid.*, sec. 78. Compare Bryce, "Flexible and Rigid Constitutions," p. 6, an essay originally published in his "Studies in History and Jurisprudence," vol. I, but subsequently reprinted by itself in a separate volume under the above title. See also an article entitled "Unwritten Constitutions in the United States," by Emlin McClain, *Harvard Law Review*, vol. XV, pp. 531-540; and an article entitled "Written and Unwritten Constitutions in the United States," by the same author, in the *Columbia Law Review*, vol. VI, pp. 69 ff.

to that between statute and common law, the *lex scripta* and the *lex non scripta* of the Romans. Some writers have, without doing violence to the facts, described the former as "statutory" constitutions and the latter as "common law" constitutions.

Generally, a written constitution is, as has been said, comprised within a single document bearing a single date, but there are examples of written constitutions composed of a series of instruments bearing different dates. Such are the "*Lois constitutionnelles*" of France, three in number; together with several amendments, which collectively make up the constitution of the French Republic. Similarly the old constitution of Austria embraced five fundamental statutes, all, however, bearing the same date. They could as well have all been incorporated in a single document but for some reason they were not.<sup>29</sup> Again, the constitution of Hungary consists of a long series of statutes and diplomas extending through a period of more than six and a half centuries (1222-1873).<sup>30</sup> Generally, a written constitution is an instrument of special sanctity, distinct in character from all other laws, proceeding from a different source, having a higher legal authority, and alterable by a different procedure. It rests on the principle of separation between the constituent and lawmaking powers. In states having written constitutions there are thus two sets of lawmaking authorities and two bodies of law, one constitutional and paramount, the other statutory and subordinate. The latter, to be valid or "constitutional," must conform in its provisions to the former.

The above-mentioned distinction, however, is not always found in states having written constitutions, though it is usual. There are a few examples of written constitutions which have not had their source in constituent assemblies, but have emanated from ordinary legislative bodies, and differ, therefore, from mere statutes not in any legal sense, but only in the greater importance of the subject matter.

<sup>29</sup> Cf. Lowell, "Governments and Parties in Continental Europe," vol. II, p. 74.

<sup>30</sup> *Ibid.*, p. 128. The text of these constitutions, translated into English, with accompanying historical notes and select bibliographies, is printed in Dodd's "Modern Constitutions," 2 vols., 1909. Hungary has not followed the example of the succession states since the war and adopted a new constitution. The Bolsheviks during their brief period of ascendancy proclaimed a constitution for the Hungarian Soviet Republic, June, 1919 (Text in Graham, "New Governments of Central Europe," pp. 565 ff.), but upon their downfall it of course disappeared. A definitive constitution remains yet to be adopted.

with which they deal.<sup>31</sup> Thus the fundamental or constitutional laws of Austria prior to the present constitution were nothing but statutes enacted by the parliament.<sup>32</sup> Similarly the Italian constitution (the *statuto*), though not a statute of parliament (having been granted by the king), is nevertheless on a legal plane with an ordinary statute and is alterable by the ordinary processes of legislation. So the constitution of Spain framed by a constituent Cortes contains no provision for its amendment, and can therefore probably be changed by the legislature as an ordinary statute, though as to this there is some doubt. In fact it appears never to have been formally altered. In such states the constituent and legislative functions are not separate, and consequently a constitutional enactment has no superior legal force over a statute.

**"Ostroyed" Constitutions.**—Some written constitutions have had their origin, as has been said, in the fiat of kings, made often under the pressure of necessity to prevent threatened revolt. Such a constitution or charter is generally regarded as being in the nature of a compact or pledge that the ruler granting it will govern according to certain principles set forth in its text. If therefore he desires to depart from its provisions he is under a moral if not a legal obligation to alter formally the constitution, so that his acts will be in conformity with its prescriptions. It may be doubted, however, whether this view is in accord with legal logic, considering that the constitution emanates from his authority and is a unilateral rather than a bilateral act.<sup>33</sup>

Sometimes it was stipulated in such a constitution that it should not be amended without the consent of the people; sometimes the king reserved to himself the right of alteration.

<sup>31</sup> As is well known, the constitutions of the British self-governing dominions are in form and legal theory acts of the British parliament. That of Canada is designated as an act and it emanated wholly from parliament. The legal status of the new Irish Constitution of 1922 is peculiar. The draft was prepared by a committee of Irish leaders, following the conclusion of a treaty between Great Britain and representatives of the Irish Republic, and the draft was finally ratified by both the Irish and British parliaments and received the royal assent on Dec. 5, 1922. In its relation to the treaty it appears to be both supreme and subordinate. As to this see Saunders, "The Irish Constitution," 18 Amer. Pol. Sci. Rev. (1921), p. 341.

<sup>32</sup> The fundamental laws of Austria, however, were not alterable as ordinary statutes. See Dodd, *op. cit.*, vol. I, p. 81, sec. 15.

<sup>33</sup> Compare Willoughby, "The Fundamental Concepts of Public Law," pp. 93-94.

Examples of charters or constitutions of this type were those granted by various liberal princes of Germany to their subjects after 1815, beginning with Nassau and ending with Prussia in 1849, the latter of which was in force until 1920; the constitutional charter granted to the French by Louis XVIII in 1814 and, as amended by the parliament, re-promulgated by Louis-Philippe in 1830;<sup>31</sup> the constitutions granted by the king of Portugal in the early part of the nineteenth century; various constitutions granted by Napoleon to the states which fell under his dominion;<sup>32</sup> the present constitution of Italy, granted by Charles Albert to his Sardinian subjects in 1848, which became the fundamental law of Italy upon the establishment of the Italian kingdom, and later the constitutions of Japan, Russia, Turkey, Persia,<sup>33</sup> and the constitution "destroyed" by the Emperor of China in 1908. Practically all the other written constitutions of the world have been framed by constituent bodies or legislative assemblies claiming constituent powers. From the point of view of their source or origin, then, we may classify constitutions as follows : (1) charters granted by sovereigns to their subjects; (2) constitutions framed by ordinary legislative assemblies; (3) constitutions framed by constituent assemblies.

**Criticism of the Old Classification.**—The classification of constitutions as written and unwritten has been criticized on the ground

<sup>31</sup> The language employed by Louis XVIII in proclaiming the Constitutional Charter was as follows : "We have voluntarily, and by the free exercise of our royal authority, accorded and do accord, grant and concede to our subjects, as well for us and for our successors forever, the constitutional charter which follows." He added : "We pledge ourselves, in the presence of the assembly which bears us, to be faithful to this constitutional charter." Burgess thinks it was within the power of the king to amend, revise or even annul it. But the French nation clearly regarded it in the light of a contract between it and the king and considered its provisions as the conditions upon which it accepted them and his rule. "Reconciliation o' Govern' ent and Liberty," p. 241. As to the charter promulgated in 1840, the Parliament finally declared that "it rested upon the national sovereignty and was considered as emanating from the people." *Ewain, op. cit.*, p. 523.

<sup>32</sup> For a list see Borgeaud, *op. cit.*, p. 32.

<sup>33</sup> The late judge Cooley denied that such documents were true constitutions. Nothing short of a body of rules which is permanent in character and beyond the power of any ruler to set aside and whose source is the people, he declared, was entitled to be ranked as a constitution. The mere grant 'y a monarch, he said, of a constitution to the people, did not impart a constitutional character to the government so long as he retained the power to set it aside at his will. "Constitutional Limitations," 7th ed., p. 5, note 2.

that the distinction between them is really one of degree rather than of kind, and hence does not mark a contrast between widely differentiated types. In the first place, all written constitutions that have been in operation for any considerable period of time have in fact become overlaid with an unwritten element consisting of custom and judicial interpretation. Written constitutions, so called, as Bryce remarked, become "developed by interpretation, fringed with decisions, and enlarged by custom, so that after a time the letter of their texts no longer conveys their full effect."<sup>37</sup> The quantity of this conventional element in any case depends largely upon the age of the constitution and the force of national tradition. Examples of written constitutions which have become supplemented and modified by a more or less extensive unwritten element are those of the United States, Hungary, and Italy. Much of the constitution of the United States, particularly those parts relating to the election, succession, tenure, and powers of the President, the procedure and methods of Congress, and the powers of the federal judiciary, has been modified in important particulars by the force of precedent, and expanded by judicial interpretation. We must take exception to the view of a well-known writer on American constitutional law, that the United States constitution "is peculiar in that it is *all written*, that it has nothing of tradition, that it is, indeed, in all respects, a statute of vast and solemn import enacted in the name of the people . . . an expression of legislative will in a written form,"<sup>38</sup>—although we cannot go quite to the length of another high authority in holding that the conventional element in the United States constitution is now quite as large as that in the British constitution.<sup>39</sup> It is true, of course, that the larger part of this constitution is written, and that what is written is contained in a single document, but to hold that there is no conventional element intermixed with the written part is to close our eyes to some of the most obvious historical facts of our constitutional development.<sup>40</sup> The same is true of the constitutions

<sup>37</sup> "Constitutions," p. 7.

<sup>38</sup> McClain, "Constitutional Law of the United States," p. 11.

<sup>39</sup> Wilson, "Congressional Government," p. 7.

<sup>40</sup> Compare on this point Brownson ("The American Republic," p. 218), who remarks that the United States constitution is twofold, written and unwritten—the constitution of the government and the constitution of the people. The former is simply a law ordained by the nation or people instituting and organizing the government; the latter is the real or actual constitution of the people as a state or

of Hungary and Italy, and to a less extent of all written constitutions that have become venerable with age. As regards the constitution of Hungary, in particular, so much custom has grown up around it that some writers do not hesitate to put it in the same class with the British constitution.

Experience has demonstrated the impossibility of embodying all the principles of constitutional law in a written document. Even if it were possible to do so in the beginning, the constitution would soon become modified and extended by growth and custom.<sup>41</sup> The conventional element is, therefore, inevitable and it is certainly not to be condemned. The French writer De Maistre asserted that what is most intrinsically constitutional and fundamental never is or could be written without endangering the state. The weakness and fragility of any constitution, he asserted, are in direct proportion to the amount of the written element.<sup>42</sup>

On the other hand, all so-called unwritten constitutions contain a very large written element. Much of what was formerly custom and usage has been reduced to writing, and this tendency increases with time. A large part of the British constitution, as Sir Henry Maine pointed out, is already written, particularly those parts which relate to the powers of the crown, the House of Lords, the judicial power, and much of that which refers to the House of Commons and its relation to the electoral body.<sup>43</sup> It is true that much of what has been written is only declaratory of what was already law by force of custom. The great acts of parliament, such as the Bill of Rights, observed Freeman, were not enactments of anything new, but merely set forth in written form what was already unwritten law.<sup>44</sup> It is true also that the written element in the British constitution is smaller in quantity than the unwritten part, and that what is written is scattered through many documents bearing widely different dates; but it is nevertheless considerable in quantity and important in quality. The British constitution, therefore, differs from those of the written type not merely because it contains many conventions, but rather because its conven-

sovereign community. "The unwritten constitution is not made, but is born with the nation."

<sup>41</sup> Compare Lowell, "Government of England," Introduction.

<sup>42</sup> Quoted by Mulsford in "The Nation," p. 144.

<sup>43</sup> "Popular Government," p. 125.

<sup>44</sup> "Growth of the English Constitution," pp. 56, 57.

*tions are more abundant and all-pervasive than the parts which are written.*<sup>45</sup>

The classification, therefore, of constitutions as written and unwritten is not only confusing and unscientific, but it results in placing in the category of written constitutions some which contain a large element of custom and convention, and in the category of unwritten constitutions others which to a large extent have been reduced to written form. Thus the constitutions of Hungary and Italy are usually classified as written, when in reality they are so overlaid with custom and possess such a high degree of flexibility that they contain more elements of true resemblance to the British constitution than they do to the constitution of the United States.

**Proposed Classification.**—It has been suggested that a more scientific and useful classification would be that of *flexible* and *rigid* constitutions, the test being the relation which the constitution bears to ordinary laws, rather than its source or mode of enactment. Those which possess no higher legal authority than ordinary laws and which may be altered in the same way as other laws, whether they are embodied in a single document or consist largely of conventions, should then be classified as flexible, movable, or elastic constitutions; while those which emanate from a different source, which legally stand over and above ordinary laws, and which may be amended by different processes, should be classed as rigid, stationary, or inelastic constitutions. The former, though they may be written, possess elasticity and may be altered with the same ease and facility as other laws; the latter cannot be thus altered, because their lines are hard and fixed. In the first class would fall the constitutions of Great Britain, Hungary, Italy, and Spain, though the last three are usually classed as written instruments. In the second class would fall probably all the other so-called written constitutions of the world.<sup>46</sup>

Sir Henry Maine classified constitutions, first, as *historical* or

<sup>45</sup> Compare Lowell, "Government of England," vol. I, p. 9.

<sup>46</sup> Bryce suggested this classification as preferable to the older classification of constitutions as written and unwritten. See his Essay on "Flexible and Rigid Constitutions," p. 11. It is worth noting, however, that the distinction between flexible and rigid constitutions is not sharp or clear, hardly more so than that between written and unwritten ones. The French constitution, for example, is almost as flexible as that of Great Britain, yet is classed as rigid because the procedure of amendment is slightly different from that of ordinary legislation.

*revolutionary*, that is, those which have developed through the accumulation of experience ; and, second, as *a priori*, or those "founded on speculative assumptions remote from experience."<sup>47</sup> The constitution of Great Britain is, of course, the best example of the former, while the eighteenth-century constitutions of France were typical illustrations of the latter type. Resembling somewhat the latter class are those denominated by Judge Jameson as "ideal" constitutions, or those "framed in the closets according to abstract ideas of moral perfection for imaginary commonwealths."<sup>48</sup> Such were the constitutions proposed by Plato, Sir Thomas More, John Locke, Lord Bacon, and Thomas Harrington.

### III. THE BRITISH AND FRENCH CONSTITUTIONS CONTRASTED

**The British Constitution.**—The best example of an unwritten constitution, so called, is that of Great Britain, "undoubtedly the first of all free constitutions in age, in importance, and in originality," says a French scholar—"a constitution which existed with all its main features four hundred years earlier than any other and one which has served more or less as the model for all existing constitutions."<sup>49</sup> In its nature it is, says Bryce, a "mass of precedents carried in men's minds or recorded in writing, dicta of lawyers or statesmen, customs, usages, understandings and beliefs, a number of statutes mixed up with customs, and all covered over with a parasitic growth of legal decisions and political habits." Dicey speaks of it as a sort of maze in which the wanderer is perplexed by unreality, by antiquarianism, and by constitutionalism.<sup>50</sup> It is not a subtle contrivance of human art nor the result of deliberate effort ; it was never made in the sense in which most others were, but has grown up bit by bit and for the most part silently and without any acknowledged authority. "There was never any moment," observed Freeman, "when Englishmen draw out their political system in the shape of a formal document."<sup>51</sup> If it were stripp-

<sup>47</sup> "Popular Government," p. 172.

<sup>48</sup> "The Constitutional Convention," p. 67. See also Wood, "Government of the State," chs. 5-7, for a discussion of constitutions as *constrictive* and *restrictive*.

<sup>49</sup> Boutmy, "Studies in Constitutional Law," 2d ed., p. 3.

<sup>50</sup> "The Law of the Constitution," 2d ed., p. 7.

<sup>51</sup> "Growth of the English Constitution," p. 22. "The English Constitution," said Boutmy (*op. cit.*, p. 27), is made up, first, of treaties or *quasi-treaties* such as

ed of its conventions and displayed in its legal nakedness, it would be unrecognizable and unworkable. The unwritten part deals with the organization, privileges, reciprocal relations, and interaction of the great public powers, crown, cabinet, and parliament. "All those important matters," observed Boutmy, "which are the very center and soul of constitutional law, are regulated in England by simple custom." The very name of the cabinet is unknown to the written law. The practice of annual sessions of parliament, its division into two houses, the exclusive power of the House of Commons to initiate revenue bills, and many other matters of fundamental character are regulated wholly by custom. "In fact, the most important part of the political organization is just what is kept out of the written law and given over to the sole guardianship of custom." "The English" have, to quote Boutmy further, "left different parts of their constitution where the waves of history have deposited them; they have not attempted to bring them together, to classify or complete them, or to make of it a consistent and coherent whole."<sup>52</sup> Many of the customs and usages which go to make up the constitution have, to be sure, been reduced to writing, and some of them have been embodied in fundamental statutes, but they have never been collected and incorporated in a single document.

Those parts of the constitution which have been reduced to written form emanate from the same source, are enacted in the same way, have the same legal authority, and are repealed or amended in the same way, as ordinary statutes. There is, in short, no separation in

the act of union, 1707, with Scotland and with Ireland in 1801 (these are "only the addenda to the constitution," "the external portion of it"); second, customs, generally known as the common law, the *lex non scripta*—in reality they are embodied in documents such as judgments, reports, legal opinions, etc.; third, compacts enacted like statutes; fourth, statutes dealing with such matters as legal rights and securities, religious liberty, press, electoral privileges. According to Dicey the English constitution consists of (1) treaties, (2) the common law, (3) solemn agreements, like the Bill of Rights, (4) statutes. "Law of the Constitution," p. 48. Again, says Dicey, "the English constitution is made up of two parts; first, a body of rules, some written, others unwritten which the courts will take no notice of." The former he denominates collectively as the "law" of the constitution, the latter he styles "the conventions." For examples of each, see his "Law of the Constitution," pp. 24 ff. The English constitution, Dicey remarks, is a judge-made constitution, and bears on its face all the features, good and bad, of judge-made law. *Ibid.*, 211.      <sup>52</sup> *Ibid.*, p. 6.

Great Britain between the constituent power and the legislative power; both are united in the parliament, which is at once legislature and constituent assembly. There is no law, fundamental or otherwise, which it cannot change.<sup>53</sup> But while the constitution-making and the statute making powers are in the same hands, there is a growing feeling that fundamental and far-reaching changes ought not to be made except as a result of a general election at which the proposed changes are the issues—in short, parliament ought to alter the constitution only in obedience to a mandate from the electorate.<sup>54</sup>

Where the constituent and legislative powers are in the same hands, the distinction between a "constitutional" law and an ordinary statute cannot easily be determined. There is no exact juristic test, as in America, where constitutional provisions and statutory enactments proceed from different sources and are altered and repealed according to different processes. Whether a given act of the British parliament, therefore, belongs to the category of constitutional law or that of ordinary statute law must depend, not on its source or manner of enactment but upon the character of the act itself. If it is fundamental in nature, that is, if it relates to the distribution or exercise of the sovereign power of the state,—for example, the Parliament Act of 1911 (*infra*, p. 555),—it may be classed as constitutional, otherwise it falls within the domain of ordinary statutory legislation. Obviously it is not always easy to draw the line between that which is fundamental and that which is not. In a technical sense De Tocqueville was correct, therefore, when he said the British constitution has no real existence.<sup>55</sup> He meant by this that there are no laws in Great Britain that can be definitely marked off from other laws as fundamental, that is, there is no legal test for differentiating between a constitutional provision and a statute.<sup>56</sup>

<sup>53</sup> See on this point Dicey, "Law of the Constitution," lect. II. The legal impotence of parliament has already been discussed in the chapter on sovereignty. A recent example of an alteration by parliament of an old rule of the constitution was the "Re-election of Ministers Act" of 1919, by which a member of parliament who is appointed to the cabinet is not obliged to seek a re-election to parliament.

<sup>54</sup> Compare Lowell, "Government of England," vol. I, p. 4.

<sup>55</sup> "Democracy in America." Translation by Reeves, vol. I, p. 103.

<sup>56</sup> This is the reason, says Bryce, why the British constitution has never been reduced to the form of a statutory enactment. Moreover, since any part might be changed by parliament as easily as any other, little or nothing would be gained.

**The Terms "Constitutional" and "Unconstitutional" in Great Britain and the United States.**—In this connection it may be observed that the terms "constitutional" and "unconstitutional" have different meanings in Great Britain and America. In Great Britain a law is "constitutional" because it is one which is supposed to affect the fundamental institutions of the state and not because it proceeds from a different source, has any higher legal authority, or is more difficult to change than other laws. An act of parliament is sometimes said to be "unconstitutional," not because it is inconsistent with some higher law, for there is no law superior in authority to a statute of parliament, but because it is supposed to be contrary to the established usages and customs of the kingdom, the principles of morality, international law, or the law of nature. The distinction is not between a legal and illegal statute, as in America, for no act of parliament can be "unconstitutional" in the sense of being illegal. An act of parliament, for example, making a man a judge in his own case, an act to tax the colonies, an act to deprive a man of his property without due process of law would be "unconstitutional" only in the sense of being a violation of ancient and well-established customs and not because of any material inconsistency with some higher written law. No court would question such an act or refuse to give effect to its provisions, however immoral or unjust it might seem. In the United States, a statute is said to be "unconstitutional," not because it is one which does not affect in a fundamental manner the organization of the state, but because it is not in conformity with the provisions of a higher written law. In the absence of such conformity the statute is said to be "unconstitutional," which is another name in America for illegality: and the courts exercise the authority of pronouncing upon the question of its consistency and of refusing to give effect to the inferior law when it is in conflict with the higher law.

**French Constitutions.**—We may contrast with the British constitution some of the earlier ones of France, which are the best representatives of the opposite theory that constitutions are made rather than evolved. The French idea of a constitution has been that of a written instrument, conceived and struck off at once, and capable of being fitted to the nation for which it is intended as a suit of clothes may be fitted to an individual. The French have never been impressed with the advantage of following in old paths, constitutionally speaking.

and of preserving continuity and connection with the past. They have allowed themselves to be seduced by the fallacy that a nation may cut loose entirely from its past, and erect a new constitutional structure better adapted to the needs of the people than any which is the product of growth and evolution. It was this fallacy which Burke severely criticized in his "Reflections on the French Revolution." The authors of the earlier French constitutions, observed Boutmy, were in the position of an architect about to erect a monument in the center of a public square ; they must have a free and clear space at their disposal.<sup>57</sup> "There is a maxim," he said, "which has remained true under all the successive régimes in France, viz., that all rights must be recorded in writing ; that no right can come into existence without a document to attest it, or be annulled without express abolition. There is no country where the feeling for customary law is more blunted than in France, or where the virtue of leaving things to be understood is less appreciated. Nor is there any country where there is a greater dislike to the idea of an equity (*droit prétorien*) which, while preserving the form, changes the substance, of written law."<sup>58</sup>

#### IV. THE AMERICAN TYPE

**Characteristics of American Constitutions.**—The American constitutions, especially the Federal constitution, and to a large degree those of Latin America which are modeled upon that of the United States, possess certain features which distinguish them generally from the constitutions of Europe and Asia. In the first place they are in large measure instruments of grants and prohibitions of power and not merely bodies of fundamental law for the organization of the government. They are characterized by the detail with which they define and enumerate the powers of the executive, the legislature, and the courts, and by the same detail with which they impose express limitations and prohibitions upon the powers of the public authorities, and especially of the legislature. These limitations and prohibitions are found not only in the text proper of the constitution itself but also in elaborate "bills of rights," which precede the formal

<sup>57</sup> "Studies in Constitutional Law," p. 167. The French constitutions, said Boutmy appear like a smart bit of new machinery, straight from the workshop and made in every respect like the patented model (p. 75). <sup>58</sup> *Ibid.*, p. 168.

text (in the federal constitution they are found in the first ten amendments). The effect is to create two distinct domains or spheres, one of liberty within which the individual is allowed freedom of action, and the other a domain of authority within which the government is free to act or can act subject to restrictions. Thus, as Burgess remarks, the American constitutions are instruments not only of government but also of liberty. One of their distinctive merits is that they insure protection to the minority against the possible tyranny and oppression of the majority. The action of the people, says Bryce, in "putting certain rules out of the reach of temporary impulses springing from passion or caprice" is "a recognition of the truth that majorities are not always right and need to be protected against themselves by being obliged to recur, at moments of haste or excitement, to maxims they had adopted at times of cool reflection."<sup>59</sup>

Some of the recently adopted constitutions of Europe with their elaborate bills of rights approximate in this respect the American type, but there is one important difference between them and the American constitutions. In the United States the sphere of individual liberty created and delimited by the constitution is protected against invasion or encroachment on the part of the government by being placed under the guardianship of the judiciary, whereas in Europe, with a few exceptions to be discussed later, it is not. As is well known, if the legislature or the executive or any local authority in the United States violates any prohibition or restriction set by the constitution to its authority, the individual who suffers injury in consequence of it may appeal to the courts and have the unconstitutional act declared null and void. In this way constitutional prohibitions are enforceable through judicial process; the government is kept strictly within the sphere marked out for it by the constitution; the legislature is not the judge of its powers; the constitution is distinctly what it purports to be, namely the supreme law of the state, paramount in authority and superior in dignity and validity to all other law.<sup>60</sup> In other countries where the constitution is not thus placed under the guardianship of the courts it manifestly cannot be the

<sup>59</sup> "Modern Democracies," vol. II, p. 11. Compare also Esmein, *op. cit.* p. 524, and Jellinek, *op. cit.*, p. 212.

<sup>60</sup> The subject of judicial control of legislation is discussed more at length in the chapter on the Judiciary, *infra*.

supreme law; in the last analysis it is on a footing of equality with ordinary statutory law and has only such binding force as the legislature in its discretion chooses to recognize. Americans naturally believe that their solution of the problem is the only one by which the supremacy of the constitution over ordinary legislation can be assured and by which the liberty of the individual as defined and guaranteed by the constitution can be safeguarded.

**Role of the Constitution as the Protector of Liberty.**—It is not to be concluded, however, that liberty cannot and does not exist in countries whose constitutions contain no bills of rights or formal prohibitions on the legislative power, or where, if they do, the judiciary is incompetent to enforce them. Professor John W. Burgess, in a book entitled "The Reconciliation of Government with Liberty" (1915), maintains that most of the constitutions outside the United States are defective for this reason. Concluding a detailed examination of the existing constitutions of Europe from the point of view of the manner in which they define and guarantee individual liberty, he says, "I cannot, therefore, consider the present constitution of the European states as offering any satisfactory solution of the great problem of the reconciliation of government with liberty. Liberty is sacrificed to government in them all."<sup>61</sup>

Referring to the lack of a bill of rights in the present constitution of France and quoting the 16th article of the famous French Declaration of the Rights of Man of 1789, to the effect that "every society in which the guarantee of rights is not assured . . . has no constitution," he says, "In plain English this means that there is no such thing as constitutional government without a series of constitutional limitations upon its powers imposed by the sovereign nation in behalf of individual liberty. According to this doctrine the present constitution of France is no constitution at all but simply a charter of government."<sup>62</sup>

What Burgess says in criticism of such constitutions is in part justified. At the same time the actual degree of liberty which the people of a country enjoy cannot be accurately measured by the number and character of constitutional phrases respecting individual liberty. The constitutions of some of the Latin-American states, "excellent instruments from a theoretical or philosophical standpoint," are quite

<sup>61</sup> Page 286; see also p. 254.

<sup>62</sup> *Ibid.*, p. 260.

as profuse in their declarations regarding liberty as those of North America, but according to Burgess himself the history of these states has been in great measure "the record of alternations between anarchy and despotism instead of steady progress in the reconciliation of government and liberty."<sup>63</sup>

On the other hand, the constitutions of Great Britain and France impose no prohibitions or limitations whatever on the legislative power and are therefore fatally defective according to Burgess's conception, and yet in both countries the degree of liberty actually enjoyed by the people is as large as in the United States, and in England it is probably larger.

#### V. STRENGTH AND WEAKNESS OF DIFFERENT TYPES OF CONSTITUTIONS

**Elements of Strength of Written Constitutions.**—Both so called "written" and "unwritten" constitutions have their elements of strength and of weakness. In favor of the enacted or written constitution are the advantages of clearness and definiteness. Its provisions being embodied in an instrument prepared ordinarily with great care and deliberation, the likelihood of uncertainty as to its meaning is obviously less than where its prescriptions consist of customs and usages. Such constitutions cannot be easily bent and twisted by the legislature or the courts to mean what the demands of the moment may seem to require, and hence the protection they afford and the rights they guarantee are apt to be more secure. The process of alteration being usually more difficult than in the case with ordinary laws, they are more stable and steady and free from the dangers of temporary popular passion. But the latter advantage often proves an element of weakness. Experience shows that the difficulty of amending rigid constitutions has often prevented the introduction of needed changes and thereby retarded the healthy growth and progress of the state. It was a saying of Macaulay that "the great cause of revolutions is this: that while nations move onward, constitutions stand still." The temptation to violate such a constitution when it is outgrown and no longer suitable to existing conditions sometimes becomes irresistible. If, on the contrary, too easy facility for producing amendments is provided, there

<sup>63</sup> *Ibid.*, p. 355.

is danger that constitutional changes may be made objects of party struggle for party purposes, and changes will be forced into the written instrument before they have wrought themselves into the constitution of the nation.<sup>64</sup>

**Strength of Unwritten Constitutions.**—In favor of unwritten or flexible constitutions, are the elements of elasticity and adaptability. Being alterable with the same ease and facility with which ordinary laws are changed, they are capable of being modified so as to make possible the adjustment of the constitution to new and changing conditions of the society. This facility of alteration not only removes the temptation to disregard the constitution, but also affords a legal means of satisfying popular passion and of minimizing or preventing revolutions by meeting them halfway. In the life of every people there are crises when inelasticity becomes a danger when the constitution must be altered or it will be violated. A flexible constitution is capable of being twisted to meet great emergencies where a rigid constitution would break under such circumstances. As Bryce aptly remarked, "they can be stretched or bent so as to meet emergencies without breaking their framework; and when the emergency has passed, they slip back into their old form like a tree whose outer branches have been pulled aside to let a vehicle pass."<sup>65</sup> Such a constitution also recovers from shocks without injury where a written constitution would be injured past mending. Judge Cooley said that "of all the constitutions which may come into existence for the government of the people, the most excellent is obviously that which is the natural outgrowth of the national life, and which, having grown and expanded as the nation has matured, is likely at any particular time to express the prevailing sentiment regarding government and the accepted principles of civil and political liberty."<sup>66</sup> And the least valuable, he added, is that which turns its back upon the national experience, disobeys the national

<sup>64</sup> Compare Jameson, "Constitutional Conventions," sec. 78. On the advantages of written constitutions, see also Lieber, "Political Ethics," vol. I, pp. 338-339.

<sup>65</sup> Essay on "Flexible and Rigid Constitutions," p. 22. As to the merits of the English constitution resulting from its flexibility compare Jellinek, *op. cit.*, vol. II, p. 213, and Esmein, *op. cit.*, p. 516. But Esmein remarks that this type of constitution is suitable only to a people who have a strong sense of tradition and a profoundly conservative spirit.

<sup>66</sup> "The Comparative Merits of Written and Prescriptive Constitutions," *Harvard Law Review*, vol. II, p. 356.

future from the past, and lays the framework of the government in ideal perfection.

One of the weaknesses of a written constitution is that it often represents an attempt to compress into a single document the principles of the political life and growth of the nation for an indefinite period of time. It is like an attempt to fit a garment to an individual without taking into consideration his future growth and changes in size. Some written constitutions in the past have been framed without regard to one of the most important principles in the life of the state, namely, that of growth and expansion.

Gladstone once observed that no greater calamity could befall a people than to break utterly with their past, and readers of Burke's "Reflections on the French Revolution" will recall his severe criticism of the French Revolutionists for doing this very thing. It was partly for this reason that the eighteenth-century French constitutions were short-lived. They were framed as if they were the starting point in the life of the state instead of a mere step, and as if they could be fitted to the nation as a strait-jacket to an individual. No "historical" constitution, said Maine, ever suffered their "ludicrous fate."<sup>67</sup> A state with such a constitution, he observed, "is at best in the disagreeable position of a British traveler whom a hospitable Chinese entertainer has constrained to eat a dinner with chopsticks."

**Defects of Unwritten Constitutions.**—Unwritten constitutions, like those of the rigid type, have elements of weakness. They have been criticized as being unstable and with no guarantee of solidity and permanence. They are, said Bryce, in a state of perpetual flux, like the river of Heraclitus into which a man cannot step twice. They can be altered to meet the temporary fancies of the moment as an ordinary statute may be, for they have no higher legal authority than other laws and are changed in no different manner. They have also been criticized as "the playthings of judicial tribunals" because in the "vast storehouse of literary matter out of which their provisions are to be gathered it is easy to find or not to find that which one will."<sup>68</sup> It has been said also that they are unsuited to democracies, and are

<sup>67</sup> "Popular Government," p. 175.

<sup>68</sup> Jameson, "Constitutional Conventions," sec. 77. Lord Birkenhead in an address before the American bar association at Minneapolis, criticized the classification of constitutions as rigid and flexible and suggested the terms "con-

more adaptable to aristocratic societies. The masses in a democracy are suspicious of, if not hostile to, constitutional prescriptions which have not been formally enacted but which rest mainly upon custom and usage. There is also a popular belief that unwritten constitutions allow a wider discretion to public officers than do those of the written type. The masses like, said Bryce, something plain, simple, and direct, and entertain a suspicion of the *arcana imperii* of which unwritten constitutions are full.<sup>69</sup>

Judge Jameson, a high authority on the subject of constitutions, thus describes the relative merits of the two types: "Considering the excellences and defects of the two varieties of constitutions, it is not easy to strike a balance between them. For a community whose political training has been carried to a high degree of perfection, in my view an unwritten constitution would, on the whole, be preferable. In that training two elements would be of vital consequence to the safety of the system; first, an accurate understanding of their political rights and duties, generally among the citizens; second, sleepless vigilance to detect violations of the constitution, and the utmost promptness and energy to resist and punish them. Without either of these elements, the usurpations of public functionaries must bring the system to speedy ruin. But for a community whose training has been imperfect or which is subject to fits of political apathy alternating with those of intense zeal for reform, a written constitution is doubtless the better one. While less flexible to the pressure of the national will, and therefore liable in many of its provisions to become obsolete and oppressive, it is a formidable barrier against usurpation. Its provisions are so plain that he who transgresses them must generally do so intentionally, and that fact must be so apparent that usurpation would in most cases not be ventured upon, as likely to arouse a dangerous opposition. The superiority of such a constitution in the circumstances supposed follows

trolled" and "uncontrolled." The British constitution, he said, belonged to the class of "uncontrolled" constitutions, and he criticized it because it is "at the mercy of a momentary gust of parliamentary opinion."

<sup>69</sup> "Constitutions," p. 31. Bryce maintains that what he denominates as "flexible constitutions" are workable only under three conditions: first, supremacy must remain in the hands of a politically educated and politically upright minority; second, the bulk of the people must be continuously and not fitfully interested in and familiar with politics; and third, though legally supreme, they must remain content, while prescribing certain general principles, to let the trained minority manage the details of the business of government. *Ibid.*, p. 39.

from the fact that immobility, with its train of possible evils, is less dangerous than movement that is ill-judged or unconstitutional.<sup>70</sup>

Whatever may be the merits and demerits of written and unwritten constitutions, it is clear that the popular preference is for the former. Strictly speaking, the British constitution is the only remaining example of the latter class. One after another of the states of Europe have followed America and adopted the written type, while Japan, China, Australia, Persia, Liberia, South Africa, and other countries outside of Europe and America have done likewise; and no state which has once tried the written constitution has ever returned to the unwritten type.

#### VI. ESSENTIALS OF A WRITTEN CONSTITUTION

**Contents of a Typical Constitution.**—A typical written constitution contains three sets of provisions: first, a series of prescriptions setting forth the fundamental civil and political rights of the citizens, and imposing certain limitations on the power of the government, as a means of securing the enjoyment of those rights; second, a series of provisions outlining the organization of the government, enumerating its powers, laying down certain rules relative to its administration, and defining the electorate; and, third, a provision or provisions pointing out the mode of procedure in accordance with which formal changes in the constitution may be brought about.<sup>71</sup> The first group of provisions collectively has been called by one writer the constitution of *liberty*, the second, the constitution of *government*, and the third, the constitution of *sovereignty*.<sup>72</sup> The first group is commonly styled in republican states a "bill of rights" or "declaration of rights." The people of the United States have always attached great importance to these declarations and have considered them a necessary part of their constitutions.<sup>73</sup> Since 1780 every constitution adopted in the

<sup>70</sup> "The Constitutional Convention," sec. 78.

<sup>71</sup> Compare Moore, "Commonwealth of Australia," p. 75.

<sup>72</sup> Burgess, "Political Science and Constitutional Law," vol. I, p. 137.

<sup>73</sup> The absence of such a group of provisions in the national constitution formed, as is well known, one of the chief objections to the ratification of that instrument when it was submitted to the people of the states, though inasmuch as the national government is one of specifically enumerated powers, it would seem that the objection was largely without foundation. The first ten amendments adopted in 1791 removed the cause of the objection.

United States, with four exceptions, has given a prominent place to such declarations.<sup>74</sup> The American declarations of rights, said Bryce, are historically the most interesting part of the constitutions, being, as they are, "the legitimate child and representative of Magna Charta and the English Bill of Rights."<sup>75</sup> In France, likewise, for a time after the Revolution, declarations of principles were considered a most essential part of their instruments of government. The constitutions of 1791, 1793, 1795, and to a less extent that 1848, contained not only elaborate declarations of the rights of the individual, but also numerous philosophical enunciations of the political doctrines and theories of the time.<sup>76</sup> It is somewhat curious that French constitutional laws of 1875 are unaccompanied by a declaration of Rights. Some French jurists however, maintain that the fundamental principles of the Declaration of 1789 are nevertheless an established part of the public law of France to-day and as such are binding upon the parliament. Thus, Duguit affirms that they are not merely "dogmatic formulas"<sup>77</sup> but are veritable constitutional laws which bind the legislature and that any act of parliament contrary to their prescriptions would be unconstitutional.<sup>78</sup> He and other French jurists maintain that the principle of 1789 were not expressly reaffirmed by the national assembly of 1871-1875 and formally incorporated in the constitution because

<sup>74</sup> The exceptions were the constitutions of Louisiana, 1812, 1845, 1852, and 1864, though in each there were a few scattering provisions in the nature of declarations relating to the rights of the individual. These declarations were originally intended to protect the people against arbitrary executive power, and since there is no longer any danger from this quarter, it has seemed strange to some foreign writers that they should continue to be repeated and multiplied in our constitutions. To such persons the reason appears to be simply the fondness of Americans for enumerating the maxims of political freedom and the principles of government. But if the danger from executive aggression has disappeared, that from legislative interference has greatly increased, and it is largely against this danger that the modern declarations are directed.

<sup>75</sup> "The American Commonwealth," ch. 26. See also Sherger, "The Evolution of Modern Liberty," pts. III-IV, and Jellinek, "Declaration of the Rights of Man and the Citizen" (English translation).

<sup>76</sup> For the English texts of these declarations see Anderson's "Constitutions and Documents of France," pp. 59, 170, 212. The French constitutions of 1799, 1804, 1814, 1820, and 1852 contained no declarations in favor of the rights of man.

<sup>77</sup> As Esmein (*op. cit.*, pp. 496 ff.) considers them. Esmein declares that they constitute *moral* but not *legal* limitations on the legislative power.

<sup>78</sup> "Droit const." (ed. 1911), vol. II, pp. 12-13. Compare to the same effect also Coumoul, "Le pouvoir judiciaire," p. 229.

they had become so firmly established that it was not deemed necessary to do so. But whatever may be the opinion of the jurists as to their binding effect upon the legislature, the French courts refuse to declare null and void acts of parliament which are inconsistent with them.<sup>79</sup> For this reason proposals have been made from time to time in the French parliament for the incorporation of a declaration of rights in the constitution and even for the establishment of a supreme court with power to annul legislative acts in violation of their provisions.<sup>80</sup> In this respect the constitution of France differs also from those which have recently been adopted in other European states, all of which now contain elaborate declarations of rights. The German imperial constitution of 1871 and of course the Prussian constitution of 1850, which was "octroyed" by the king, were almost entirely lacking in provisions relative to the liberty of the individual, but the new constitutions which have superseded them contain declarations of fundamental rights of the citizens which surpass even the early declarations of the French and of the American constitutions.

**Provisions Relating to the Organization of Government.**—The second group of provisions, as has been said, relate to the organization of the government in its widest sense, including the distribution of powers among the several departments, the organization of the particular agencies through which the state manifests itself, the extent and duration of their authority, the modes of appointment or election of public functionaries, and the constitutions of the electorate. In some constitutions the provisions of this character are few in number and very general in character. The "constitutional" laws of France, for example, contain no provisions regarding the composition, mode of election, tenure, organization, or powers of the Chamber of Deputies, except the solitary provision that the chamber shall be chosen by an electorate constituted on the basis of universal suffrage. They contain nothing whatever in regard to the judiciary, and since the amendment of 1884, which "deconstitutionalized" the articles relating to the Senate, nothing in regard to the second chamber of parliament. It has been said of the French constitution that it is distinguished rather more

<sup>79</sup> As to this see the chapter on the Judiciary, *infra*.

<sup>80</sup> Such a proposal was made by M. Renoist in 1903. *Jour. off. Ch. des Déps.*, Apr. 29, 1903. A similar proposal was more recently advocated by President Millerand.

for what it omits than for what it contains. For these reasons some French writers have asserted that France really has no constitution.<sup>81</sup>

**The Constitution of the United States.**—The constitution of the United States is in respect to its content and character the model of written constitutions. Its provisions in regard to the organization of the government are general in character, yet sufficiently detailed to embrace most of those matters which may be considered as essential and fundamental. It provides for the distribution of the powers of government among the legislative, executive, and judicial departments, and for the organization in a general way of each of the departments; it contains a brief and logical statement of their jurisdiction and powers; and a list of prohibitions upon both the national and the state governments. It contains remarkably few miscellaneous provisions. There is nothing, or very little, relating to trade, industry, banks, and other corporations, railroads, schools, or the army or the navy. All together it is a model of brevity, of logical and scientific arrangement, and of conciseness of statement; and it is worth noting that the language in which it is cast is remarkably free from redundant and ambiguous phrases. Lord Bryce said of it that it "ranks above every other written constitution for the intrinsic excellence of its scheme; its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, and its judicious mixture of definiteness in principle with elasticity in details."<sup>82</sup>

Most of the new European constitutions, however, have not followed the American model in this respect. They greatly exceed the constitution of the United States in their length, in the detail of their prescriptions, and in the degree to which they deal with matters of ordinary law, including, as they do, regulations relating to matters of administrative, criminal, and parliamentary law.<sup>83</sup> It must be ad-

<sup>81</sup> "To speak truly," says Cahen ("La loi et le règlement," p. 424), "France has no true constitution; it has laws which fix the organic relations of the public powers, but it has no charter of public liberties, in the absence of which the men of the Revolution said there could be no constitution." "In France," says Seignoré (*Rev. pol. et parl.*, 1904, p. 536), "I repeat, we have no constitution; we have only laws relative to the functioning of the public authorities. In this respect we are in a condition of notorious inferiority as compared with other countries." Compare also the somewhat similar opinion of Burgess quoted above.

<sup>82</sup> "The American Commonwealth" (ed. 1910), vol. II, p. 28.

<sup>83</sup> The same thing may be said of the newer Latin-American constitutions, notably that of Chile, promulgated September 18, 1925, and of the Brazilian

mitted, however, that the line of demarcation between matters which may be appropriately regulated by the constitution, or which should be so regulated, and those which may or should be left to statutory regulation, must necessarily vary as the complexity of the political, economic, and social life of the country increases. Affairs which in 1789 could be safely left to be dealt with by ordinary law, require, under the conditions which exist to day, to be regulated by the constitution. It is hardly necessary to add that the developments of the present age have brought into existence a great variety of new problems which are appropriate or necessary subjects of constitutional law, which were non-existent and even undreamed-of when the constitution of the United States was adopted. These conditions, coupled with the changing popular attitude in respect to the function of a constitution, account for the increasing tendency of constitutions to grow in length and to embody details which under early conditions and conceptions found no place in their texts.

## VII. DEVELOPMENT AND EXPANSION OF CONSTITUTIONS

**Processes of Growth.**—It is an old saying, attributed both to Sir James McIntosh and Sir Henry Maine, that constitutions grow, instead of being made. Whatever may be the amount of truth contained in the saying, it is undeniably true that no existing constitution has reached its final form and become, as it were, a dead or fixed thing incapable of further development. Time and habit, said President Washington, in his farewell address, are at least as necessary to fix the true character of governments as of other human institutions.

constitution of 1891. As is well known, the American state constitutions violate in conspicuous fashion the canons laid down above in regard to the content and character of a constitution. They have steadily grown in length until some of them to-day resemble codes of ordinary law.

The Virginia constitution, for example, has grown from a document of a few pages to one of seventy-five; from an instrument of about fifteen hundred words to one of more than thirty thousand. The present constitution of Alabama contains about thirty-three thousand words; that of Louisiana, about forty-five thousand; that of Oklahoma, about fifty thousand. The result has been to destroy in large measure the intrinsic distinction between the constitution and ordinary statutory legislation. The detailed character of the state constitutions and the reasons which have brought it about are well described by Dood in an article entitled "The Function of a State Constitution," *Pol. Sci. Quar.*, vol. XXX (1915), pp. 201 ff.

"Constitutions must grow," observed Lord Brougham, "if they are of any value; they have roots, they ripen, they endure." "Those that are fashioned," he continued, "resemble painted sticks, planted in the ground, as I have seen in other countries what are called trees of liberty. They strike no root, bear no fruit, swiftly decay, and ere long perish."<sup>84</sup>

**Custom and Usage.**—Written constitutions grow in three ways: by usage, by judicial interpretation, and by formal amendment. The part played by custom and usage in the development of a constitution depends upon a variety of circumstances. It is more potent in the case of old than of new constitutions. It also plays a more important rôle in old and well-settled societies, where the inhabitants have greater veneration for the past and a higher regard for precedent than those of newer societies have.<sup>85</sup>

In the newer states of America, where constitutions are often revised or made over entirely at least once in every generation, development by usage is inconsiderable. Similarly in France, where the constitutional development of the country has been characterized more by revolution than by evolution, and where eleven constitutional régimes have come and gone since 1789, the development of the constitution through usage and custom has been relatively small.<sup>86</sup> The constitution of the United States, however, the oldest existing American constitution except that of Massachusetts, has developed and expanded in many directions through the operation of custom and usage, as has already been mentioned above.<sup>87</sup> In all states the laying down of new rules and the inauguration of new practices tend to create a body of customary law which supplements and often modifies to some extent the actual working of the law as embodied in the written constitution. A constitution so free of detail and so concise of statement as that of

<sup>84</sup> "The British Constitution," "Works," vol. XI, p. xxi.

<sup>85</sup> Compare Bryce, "The American Commonwealth," ch. 32.

<sup>86</sup> But under the present constitution, which has now been in force for more than 50 years, a considerable customary element has grown up about it. Such are the rules that the president may not serve a second term, that he may be compelled by parliament to resign, that when selecting the prime minister he shall consult the presidents of the two chambers, and various others.

<sup>87</sup> Various examples of customs and usages which may now be regarded as a part of the "unwritten" constitution of the United States are mentioned in Ogg and Ray, "Introduction to American Government," pp. 220 ff., and in Beard, "American Government and Politics," ch. 4.

the United States must necessarily be supplemented by legislation, judicial interpretation, or usage. Without understandings and conventions it would in fact be unworkable.

**Development by Judicial Interpretation.**—The development of a written constitution by judicial interpretation necessarily results from the ambiguities of language and the deficiencies of expression which abound in the most carefully framed instrument, from the rise of new conditions, and finally from the inevitable differences of opinion which arise concerning the meaning of its provisions. Under such circumstances it devolves upon the judiciary to ascertain not only the true meaning of that which is expressed in the constitution but also that which the framers intended to express, and of drawing conclusions respecting its applicability to subjects which lie beyond the direct expressions of the text and which the framers would have dealt with had they been gifted with the power of foresight.<sup>88</sup> Expansion by interpretation is especially potent in countries like the United States, where the judiciary plays an exceptionally important rôle, possessing not only the power to interpret the meaning of the provisions of the constitution, but also to declare statutes which are in conflict with the supreme law to be of no force and effect. It is almost a commonplace to say that a very large part of the constitution of the United States consists of judicial addenda. Almost every clause has been the subject of interpretation and construction; and if we were to strip it of the meanings that have been added by the courts during its existence of more than a century, we should hardly be able to recognize it.

**Development by Formal Amendment.**—The most definite source of constitutional expansion, particularly in republican states, is, of course, formal amendment of the written instrument in accordance with the method of procedure set forth by it. As has been said, provision for its own alteration has come to be regarded as an essential part of every written constitution. Some of the early American state constitutions (eight of them all together and all belonging to the eighteenth century) contained no such provisions.<sup>89</sup> Whether this

<sup>88</sup> The former act is known as "interpretation," the latter as "construction." See Cooley, "Constitutional Limitations," ch. 4; Bouvier, "Law Dictionary," *su' verbo* "Interpretation" and "Construction"; and Lieber, "Practical and Legal Hermeneutics," ch. 3.

<sup>89</sup> For detailed consideration of the methods of amending the American state

omission was due to oversight, or failure to appreciate the obvious advantages of expressly pointing out in the constitution itself the mode of procedure to be observed in altering its provisions; or whether it was due to the prevailing opinion, repeatedly asserted in the bills of rights, that the people have an inalienable right at all times to amend their constitutions and hence a belief that no necessity existed for limiting their right by self-imposed restrictions,—there is a difference of opinion. Whatever may have been the reason, the desirability, not to say necessity, of providing in the constitution a method of legal and orderly procedure for making alterations soon came to be recognized; and all the American state constitutions framed since the beginning of the nineteenth century, with three exceptions, have contained amending provisions.<sup>90</sup> No written constitution is complete without such a provision, and of those actively in force to-day, those of Italy and Spain appear to be the only ones which are silent on this point. In some respects the amending provision is the most important part of the constitution, because, as has been said, upon the correspondence of the written constitution with the real and natural conditions of the state depends the question whether it shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression, and revolution.<sup>91</sup> President Wilson aptly remarked that a constitution must of necessity be "a vehicle of life"; that "its substance is the thought and habit of the nation" and as such it must grow and develop as the life of the nation changes. "Living political constitutions must be Darwinian in structure and in practice."<sup>92</sup> John Stuart Mill well observed that no constitution can expect to be permanent unless it guarantees progress as well as order.<sup>93</sup> Human societies grow and develop with the lapse of time, and unless provision is made for such constitutional readjustments as their internal development requires, they must stagnate or retrogress.

**Unamendable Constitutions.**—In a few instances constitutions have even undertaken to prohibit absolutely their own amendment

constitutions, see my article entitled "The Amendment of State Constitutions," in the *American Political Science Review*, vol. I, no. 2.

<sup>90</sup> The exceptions were those of Virginia, of 1820, 1851, and 1964.

<sup>91</sup> Cf. Burgess, "Political Science and Constitutional Law," vol. I, p. 137.

<sup>92</sup> "Constitutional Government in the United States" (1921), pp. 22, 57.

<sup>93</sup> "Representative Government," p. 8.

in respect to certain provisions. Thus an amendment to the French constitution adopted in 1884 declares that the national assembly shall never entertain a proposal for the abolition of the republican form of government. Whether one national assembly can thus legally tie the hands of another in perpetuity is doubtful. Esmein<sup>94</sup> thinks it may. Duguit adopts the contrary view<sup>95</sup> and it would seem rightly so. The provisions in the constitution of the United States that no amendment could be made prior to the year 1808 affecting in any manner the first of fourth clauses of Sec. 9 of Article 1 (relative to the prohibition of the importation of slaves) and that no state without its consent shall be deprived of its equal suffrage in the Senate<sup>96</sup> afford somewhat similar examples of an attempt to limit the sovereign power of the people to change the constitution under which they live. Such provisions are highly objectionable on grounds of public policy and are of doubtful validity. They rest on the assumption that their authors are infallible and that they have a right to bind future generations to accept as final what they have decreed. An unamendable constitution, said Mulford, is the "worst tyranny of time, or rather the very tyranny of time. It makes earthly providence of a convention which has adjourned without day. It places the scepter over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres."<sup>97</sup> Each generation, said Jefferson, has a right to determine the law under which it lives ; "the earth belongs in usufruct to the living ; the dead have neither powers nor rights over it."<sup>98</sup>

**Flexibility of Amendment.**—The provision for amendment should be neither so rigid as to make needed changes practically impossible nor so flexible as to encourage frequent and unnecessary change and thereby lower the authority of the constitution. The machinery

<sup>94</sup> *Op. cit.*, p. 977.

<sup>95</sup> *Op. cit.*, vol. II, p. 530.

<sup>96</sup> Art. V. A similar provision is found in the Constitution of Brazil. Art. '40. sec. 34.

<sup>97</sup> "The Nation," p. 155. "To make amendment difficult or well-nigh impossible," continues Mulford, "and then to assume that it shall be exclusively and exhaustively definitive of the action of the people in all events, involves the denial of the organic and moral being of the people.....It is directly immoral, since in its necessary inference the people no longer exists as a power in the moral order which is the life of history."

<sup>98</sup> Quoted by Merriam, "American Political Theories," p. 151.

of amendment, remarked Judge Jameson, should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order to set it in motion, an accumulation of force sufficient to explode it. In arranging it, due consideration should be given on the one hand to the requisites of growth and on the other hand to those of conservatism. "The letter of the constitution must neither be idolized as a sacred instrument with that mistaken conservatism which clings to its own worn-out garments until the body is ready to perish from cold, nor yet ought it to be made a plaything of politicians, to be tampered with and degraded to the level of an ordinary statute."<sup>99</sup>

**Some Existing Modes of Amendment.**—It is not possible here to consider the modes of constitutional amendment which have been adopted in the different countries. Undoubtedly the most flexible is that of Great Britain, where, as already stated, the procedure is exactly the same as that for the enactment or amendment of ordinary statutory legislation. In the absence of a provision in the constitution of Italy for its own amendment, the parliament has assumed the prerogative of amending it at will, and apparently according to the ordinary process of legislation. So far as the amending power is concerned the constitution of France also is flexible, changes being made by the parliament meeting at Versailles in joint assembly of the two chambers after they have by separate resolutions at Paris declared in favor of amendment.<sup>100</sup>

Most constitutions are rigid in the sense that they are amendable only by a different procedure than that by which ordinary laws may be altered; that is, they distinguish clearly between the constituent power and the legislative power, each being exercisable by different organs according to different processes. Generally, the procedure is also much more difficult.

<sup>99</sup> "Constitutional Conventions," p. 549.

<sup>100</sup> There has been much discussion as to whether the national assembly is limited by the preliminary resolutions of the chambers at Paris, that is, whether if the chambers have specified the particular articles to be amended and indicated the sense of the amendment the national assembly may amend other articles than those specified or in a different sense. Esmein (*op. cit.*, pp. 977 ff.) maintains that the assembly is so limited and Burgess (*op. cit.*, I, 171) adopts the same view. Duguit, on the contrary (*op. cit.*, 1911, vol. II, pp. 529 ff.), contends that it is not, but is a fully sovereign body. The practice has been in accord with Duguit's view.

Thus under the constitution of the United States an amendment may be prevented by the vote of one more than one third of the members of either the Senate or the House of Representatives, and when proposed by the two houses may be defeated by the legislatures of one more than one fourth of the states. Indeed, it would be possible, on account of the great inequality of population of the different states, for one fortiofth of the people living in sparsely settled states to prevent an amendment demanded by the other thirty-nine fortioths.<sup>101</sup> In consequence of this cumbersome and undemocratic system of amendment it has been proposed to substitute a more flexible and democratic procedure under which an amendment might be proposed by a simple majority of the two houses of Congress and ratified by a majority of the voters in a majority of the states, provided the latter were a majority of the total vote cast throughout the country.<sup>102</sup>

Some of the American state constitutions are even more difficult of amendment, and in several of them (e.g., Illinois and Indiana), efforts to change them have rarely succeeded.<sup>103</sup>

**Opposing Attitudes in Respect to the Sanctity of the Constitution.**—The opinions of political writers regarding the attitude which a people should adopt in respect to their constitution—whether it should be treated as something sacred and therefore left to develop only by natural processes, or whether it should be regarded in the light of all human institutions and should be freely altered from time to time so as to bring it into harmony with new and changed conditions, have naturally varied. The political philosophy of Edmund Burke represented the former view. In his "Reflections on the French Revolution" he maintained that the constitution is an "entailed inheritance," a "trust" to be administered by those who inherit it; it is therefore sacrilegious to touch it with violent hands as the French "architects of ruin" had done in the case of their own constitution. The path of

<sup>101</sup> Kimball, "National Government of the United States," p. 44, and Ogg and Ray, *op. cit.*, p. 215.

<sup>102</sup> The late Senator LaFollette made such a proposal in 1912. See on the whole subject, Tanger, in the *Amer. Pol. Sci. Rev.*, vol. X (1916), pp. 689 ff.; Thompson *Proc. of the Acad. of Pol. Sci.*, 1913, pp. 17 ff.; Ames, "Proposed Amendments to the Constitution of the United States," *Ann. Rep. Amer. Hist. Assoc.*, 1891, pp. 3-3 ff.

<sup>103</sup> For details see my article on "The Amendment of State Constitutions," *Amer. Pol. Sci. Rev.*, vol. I, pp. 213 ff.

happiness for both men and nations, he said, does not lie through sweeping innovation but in revering and doing justice to the past.<sup>104</sup> So extreme a view of the sanctity of the constitution finds few supporters to-day, but even in the United States there are some who deplore the modern tendency to regard constitutions in a spirit which they consider as irreverent.<sup>105</sup> But with the passing of time the view of Jefferson has come more and more to be the political philosophy of the mass of the American people and indeed of the democratic peoples of the world generally. Constitutions, he said, should not be looked upon with "sanctimonious reverence like the ark of the covenant, too sacred to be touched."<sup>106</sup> The frequency with which old constitutions are revised or replaced by new ones is evidence enough that the philosophy of Jefferson rather than that of Burke has triumphed.<sup>107</sup>

<sup>104</sup> See the summary of his philosophy on this point in MacCunn, "The Political Philosophy of Edmund Burke" (1913), ch. 5; in Vaughan, "Studies in the History of Political Philosophy" (1925), vol. II, ch. 1; and Graham, "English Political Philosophy" (1911), chs. 1-4.

<sup>105</sup> See for example, Butler, "Why Should We Change Our Form of Government" (1912), ch. 1, and his "True and False Democracy" (1907), ch. 1. Some years ago Elihu Root expressed the hope that the American people would never "contract the amending habit," and a southern senator in an address in the Senate in 1909 expressed the hope and belief that there would never be another amendment to the constitution of the United States.

<sup>106</sup> "Works," vol. X, p. 42.

<sup>107</sup> The attitude of Americans toward the federal constitution is of course somewhat different from their attitude and practice in respect to the state constitutions. Lord Bryce, writing of the federal constitution in 1910, said the veneration for it had become an influence so manifestly conservative that no proposal to change it fundamentally had any chance of success. President Lowell, speaking more recently of the tendency to glorify and adore it, remarked that in this respect it was for the American people what the king was for other nations. But the amendments which have been made subsequent to these pronouncements would seem to indicate that this spirit of veneration is in the process of weakening.

## CHAPTER XIX

### THE ELECTORATE

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### I. NATURE OF THE ELECTORAL FUNCTION

**Importance of the Electoral Function.**—The constitution of the electorate and the organization of the processes through which it exercises its functions are questions of paramount importance in a system of representative government, for the reason that it constitutes the very foundation and essence of that system. As will be pointed out in the following chapter, the electorate is not only the body of citizens which in most democratic states determines in the last analysis the form of government of the state and chooses those who guide and direct its affairs, but in modern democracies it has, in the opinion of many writers, acquired the character of an organ of government itself.

The functions of the electorate are exercised through the process of voting; those who exercise, or are entitled to exercise the function, are called voters or electors; the instrumentality through which it is usually exercised is the ballot (in French, *bulletin*); and the meeting at which it is done is the election.

**Theories as to the Nature of the Suffrage.**—Regarding the nature of the suffrage there have been two general theories. *First*, it has been regarded as a natural and inherent right of every citizen—at least of every adult male citizen—who is not disqualified by reason of his own reprehensible conduct or unfitness: a right which belongs to him by virtue of his membership in the state. *Second*, it has been regarded rather as a public office or function conferred upon the citizen for reasons of social expediency; and because the welfare of society is in large measure dependent upon the wise discharge of the function, it is conferred only upon those who, it is believed, are fit and capable of so discharging it.<sup>1</sup>

<sup>1</sup> To these two general theories Professor Shepard adds three others: *first*, "the primitive tribal theory" which was dominant in the city states of antiquity and which regarded the suffrage as a necessary attribute of membership in the state; *second*, the "feudal theory," which regarded it as an adjunct of a particular status, generally "tenurial" in character; that is, a vested privilege usually accompanying the ownership of land; and, *third*, the "ethical theory"—the theory which finds an increasing number of supporters—which regards it as a necessary and essential means for the development of individual character. "The Theory of the Nature of the Suffrage," *Proc. Amer. Pol. Sci. Assoc.*, Supp. to *Amer. Pol. Sci. Rev.*, vol. VII (1913), p. 108. The third of these theories does not necessarily conflict with the theories that the suffrage is a natural right or an office. If it is conferred upon the citizen either as a right or as an office it may be a means for the development of character. Of the ethical theory, Professor Shepard says it undoubtedly

**Is Suffrage a Natural Right?**—The view that the suffrage is a natural right of the citizen dominated the political philosophy especially of the United States and France during the latter part of the eighteenth century. The idea may be said to have had its roots in the natural law doctrines of the Middle Ages and especially in the teachings of the monarchomachs (notably Marsiglio, Ockam, and others) of the sixteenth century. With the development of the doctrines of the social compact and of popular sovereignty, the notion of the abstract right of the individual to a share in the government of the state became a logical principle of that philosophy. In America it found supporters in the leaders of the Revolutionary movement, notably Otis and Paine, and the doctrine may be deduced from the declarations of rights of some of the first state constitutions, such as those of Massachusetts and New Hampshire, relative to the nature of the body politic as a compact and the inherent rights of the citizen. In France the notion appears to have found a supporter in Montesquieu, who declared that "all the inhabitants . . . ought to have a right of voting at the election of representatives, except such as are in so mean a situation as to be deemed to have no will of their own."<sup>2</sup>

From Rousseau's doctrine that sovereignty resided in the people and that, in consequence, every citizen had an inalienable right to participate in the exercise of that sovereignty, the natural right of voting followed as a logical necessity.<sup>3</sup> This doctrine was enunciated by various leaders of the French Revolution, notably Robespierre, Petion, and Condorcet. Sovereignty, said Robespierre, resides in all the people, and every citizen, whoever he may be, should have a share in representation and the right to participate in the formation of the law by which he is bound.

**Principles of French Revolutionary Constitutions.**—Nevertheless, the National Assembly of 1789, while proclaiming Rousseau's dogma

played a part in the enfranchisement of the negroes in the United States and of the inhabitants of Porto Rico and the Philippines, and that in doing so the United States "struck a higher note of political idealism than had ever before been reached" (p. 136).

<sup>2</sup> "Esprit des lois," bk. XI, ch. 6.

<sup>3</sup> "Contrat social," bk. IV, ch. 1, and bk. III, ch. 1. Compare also Duguit, "Droit const." (2nd ed.), vol. II, p. 442 and Esmein, "Droit const." (5th ed.), p. 297. Rousseau's doctrine, says Duguit, led not only to universal suffrage but to equality of suffrage.

of popular sovereignty, more logical than he was, did not consider that it necessarily required the *active* participation of all the citizens in the exercise of that sovereignty, and the constitution that it formulated and promulgated in 1791 made a distinction between "active citizens" and "passive citizens," the latter being allowed no share in the election of representatives.<sup>4</sup> Every Frenchman was a "passive citizen"--this was a right; those who fulfilled certain conditions were "active citizens," electors; this was a function. The idea which dominated the assembly, says Duguit,<sup>5</sup> was that the suffrage is not a *right* but an *office (fonction)*. Every person living in society was recognized as having an individual right, superior to all positive law and imposing itself upon the legislature, the right of a citizen. But this was not the right to vote; it was a right to be recognized as a component part of the nation, which latter was the sole titulary of the public power; the citizen could vote only if the legislature had conferred upon him this function.<sup>6</sup> It should be said, however, that there were vigorous protests against this distinction, which denied to some citizens what was regarded as an inherent, natural right of all, and in the Convention of 1792 the radicals who had the ascendancy gave full effect to the theory of suffrage as an abstract right.

Article 27 of the Declaration of Rights voted by the Convention affirmed that sovereignty resided essentially in the whole people and each citizen had an *equal right* to participate in its exercise. This doctrine was definitely embodied in the constitution of 1793 (adopted by the people by referendum though never put into effect), which declared every male person 21 years of age born and domiciled in France to be a citizen and an elector. The logic of this philosophy

<sup>4</sup> Constitution, Title III, ch. I.

<sup>5</sup> *Op. cit.*, p. 444.

<sup>6</sup> The view that voting is a "public commission" or a "public function" rather than a natural right, was in fact expressly declared by Thouret, Barnave, Sieyès, and others in the Convention. But was the distinction between active and passive citizens not in conflict with Article 6 of the Declaration of Rights, which affirmed that "all the citizens have the right to participate personally or through their representatives in the formation of the general will?" Duguit thinks it was not. The thought of the assembly, he says, was this: The general will is the collective will of the nation personified; all citizens participate in the formation of this will, but this will is *expressed* only by those citizens who are electors or agents, that is, those who have been vested by law with the function of expressing the will of all. *Ibid.*, p. 445.

would have required the extension of the same right to women, and Condorcet in particular endeavored to have it so extended.

**Rejection by the French of the Natural Right Doctrine.**—This doctrine of the natural and inherent right of every citizen without distinction to exercise the electoral function was never proclaimed in any subsequent French constitution. That of 1795 embodied substantially the principle enunciated in the constitution of 1791.<sup>7</sup> Every Frenchman was declared to be a citizen, but voting was treated as a *fonction* and its exercise was conferred only upon those who fulfilled certain conditions, among others, the payment of taxes. Thomas Paine and other radical members, however, vigorously defended the doctrine that voting is a natural right of every citizen.

In 1848, when universal suffrage was first actually put into operation, the arguments advanced in favor of it were similar to those of 1789-1791, but the dogma of the natural right of all citizens to vote was not proclaimed in the text of the constitution; on the contrary, the provision of Article 28 that the electoral law to be passed by the legislature should determine the causes for which Frenchmen might be deprived of the right to vote was inconsistent with the doctrine of the inherent right of all French citizens to the suffrage.<sup>8</sup>

**View that Suffrage is an Office or Function.**—The view which practically all writers on political science adopt to-day in regard to the nature of the suffrage is that it is an office or function which is con-

<sup>7</sup> Boissy d'Anglas, the reporter of the proposal for a restricted suffrage, characterized the constitution of 1793 as "the organization of anarchy." Shepard, article cited, p. 126.

<sup>8</sup> Professor Duguit (*op. cit.*, p. 447, and "L'état," vol. II, ch. I) concludes a review of French theory by expressing the opinion that according to the French conception the voter is at the same time the titulary of a right and an office (*fonction*) and that suffrage is at the same time a right and an office. The right is the right to be recognized as a citizen, a right which carries with it the "power" to vote, if the quality of citizen is accompanied by other qualities required by positive law to enable him to vote; the function implies the competence conferred upon a certain individual, invested with the quality of citizen, to exercise a certain public activity which calls him to vote. The matter is also luminously discussed by Carré de Malberg, "Théorie générale de l'état" (1922), vol. II, p. 440 ff. His conclusion, like that of Duguit, is that suffrage is successively both an individual right and a state office (*fonction*); it is a right in so far as it belongs to the individual to exercise it; it is an office when viewed from the standpoint of the effects produced by it (p. 462). This appears to be also the view of Esmein, *op. cit.*, 7th ed., vol. I, pp. 367 ff.

fered by the state upon only such persons as are believed to be most capable of exercising it for the public good, and not a natural right which belongs without distinction to all citizens of the state.<sup>9</sup> The suffrage is a franchise or privilege; as to whether the exercise of it is a moral duty, and whether it ought to be a legal obligation opinions differ.

In practice, all electoral systems, even in the most radical democratic countries, are constituted on this principle. Nevertheless it is still the view of the masses who have no taste or talent for drawing fine distinctions, that every man does have a sort of primordial or natural right to vote, a right of which he cannot justly be deprived on grounds of alleged incapacity.<sup>10</sup> It was partly on this ground that the demand for the enfranchisement of women was based.

**Is the Exercise of the Electoral Office a Duty?**—If the electoral function is an office or trust conferred or enjoined upon the individual in the interest of the social good, it would seem to follow logically that it is his duty to perform the functions with which he has been invested.<sup>11</sup> Ought he to be obliged, therefore, by law to vote? That is, should what is generally admitted to be a moral or civic duty be made a legal obligation, the neglect of which should be punishable as

<sup>9</sup> Compare Story, "Commentaries," vol. I, sec. 580; Carré de Malberg, *op. cit.*, vol. II, pp. 429, 438 and 445; and Esmein, *op. cit.*, p. 306, where it is declared to be a "social function," the discharge of which supposes that the citizen who is invested with it possesses sufficient capacity to exercise it in the general interest.

Compare also Bluntschli ("Politik," p. 421), who justly remarks: "Aber das Wahlrecht im Staate und für Staatszwecke ist nicht ein natürliches Menschenrecht, sondern ein staatliches, vom Staate abgeleitetes, dem Staate dienendes Recht. Es besteht nicht ausser dem Staate und darf nicht bestehen wider den Staat. Nicht als Menschen sondern als Staatsbürger üben die Wähler dieses Recht aus. Sie haben dieses Recht nicht aus sich, nicht weil ihre persönliche Existenz und Entwicklung es erfordert, sondern sie haben es durch die Staatsverfassung empfangen und üben es im Dienste des Staates aus."

In the same sense see Ritchie, "Natural Rights," p. 255; Meyer, "Wahlrecht," p. 41; Ostrogorski, "Rights of Women," pp. 191; and Jamison, "Constitutional Conventions," sec. 337, who says the suffrage "is not a right at all: it is a duty, a trust enjoined upon, or committed to, some citizens and not to others." The supreme court of Maryland in the case of *Anderson v. Baker* (?3 Md. 596) said: "The right of suffrage is not an original, indefeasible right, even in the most free of republican governments; but every civilized society has uniformly fixed, modified, or regulated it for itself, according to its own free will and pleasure....."

<sup>10</sup> Compare Bryce, "Hindrances to Good Citizenship," p. 55, and Shepard, *Art. cited.*, p. 127.

<sup>11</sup> Cf. Duguit, *op. cit.*, p. 448.

is the refusal of the citizen to perform jury service and, as is not uncommon, to discharge the duties of certain offices to which he may have been elected or appointed? Writers and statesmen are by no means lacking who hold the affirmative opinion. Where a representative democratic system of government is found, it is especially important, so it is argued, that all those who have been invested with the electoral franchise should participate in the choice of public officers or in referendal elections on legislative projects or questions of public policy submitted to them, otherwise the results of the election may not accurately represent the real will of the electorate.<sup>12</sup>

**Compulsory Voting.**—In practice, however, compulsory voting has rarely been adopted by states. At the present time it appears to be in force only in Belgium, Rumania, Argentina, the Netherlands, Czechoslovakia, and some of the Swiss cantons. It was embodied in the constitution of Belgium (Art. 48) in 1893 in consequence of the large abstentions on the part of the voters (they were 30 per cent in 1884 and 16 per cent in the important election of 1892)—abstentions which no doubt were due in part to the necessity which the voters were under of repairing to the capital town (*chef-lieu*) of the district.<sup>13</sup> The penalties prescribed for failure to vote were comparatively light, ranging from a reprimand or a fine of from one to three francs for the first offense to disfranchisement and disqualification from holding office for the fourth offense. The penalties proved fairly effective and the abstentions fell at once to about 6 per cent and have continued approximately the same ever since. The provision for compulsory voting was retained in 1921 when the system of plural voting was discarded, and there appears to be little popular demand for its abolition.

In Spain compulsory voting was introduced by law in 1907. The law required all males 25 years of age, except judges, notaries, priests, and men over seventy years of age, to vote unless absent from the district or sick. Failure to do so was punishable by publication of the

<sup>12</sup> This appears to be the view of M. Duguit. See his "Manuel de droit const." pp. 91-92, and his "Traité de droit const." (2d ed.), vol. II, p. 448. On obligatory voting generally see Moreau, "Le vote obligatoire," *Rev. Pol. et Parl.*, vol. VII (1896), p. 36; Mallat, *ibid.*, Apr. 10, 1906, p. 119; Coutant, "Le vote obligatoire" (1893); and Jéze, in the *Rev. du Droit. Pub.* (1905), p. 782.

<sup>13</sup> Reed, "Government of Polities of Belgium," p. 56. See also Nerinex, "Compulsory Voting in Belgium," *Ann. Amer. Acad. of Pol. and Soc. Sci.*, Sept. 1900, pp. 275 ff.

name of the delinquent as a mark of censure, by a two per cent increase of his taxes, by the loss of one per cent of his salary if he was in the employ of the state, and in case of repetition of the offense, by the loss of the right to hold public office in the future. The law is said to have been largely a dead letter as appears from the fact that as many as 80 per cent of the electors in some country districts abstained from voting.<sup>14</sup>

Compulsory voting was introduced by law in Argentina in 1912, where it is said to be successful, and by constitutional amendment in the Netherlands in 1917, in the latter country for the same reason which had led to its adoption in Belgium in 1893. The penalty for failure to vote in the Netherlands is 3 florins for the first offense and 10 for each subsequent offense. On account of widespread opposition to the law, however, it has been difficult to enforce it. It is said that in Amsterdam and the Hague, especially, in a recent election large number of persons united into groups for the purpose of turning the system into ridicule by voting for absurd candidates.<sup>15</sup> By a constitutional amendment in 1925 the obligatory clause was removed from the constitution and the matter is now regulated by statute, for the repeal of which there is much demand. By the electoral law of February 29, 1920, compulsory voting was introduced into Czechoslovakia. The obligation does not apply, however, to voters over 70 years of age or to sick persons. The penalty prescribed is severe : a maximum fine of 5000 crowns or a term of imprisonment varying from 24 hours to one month. The constitution of Rumania (1923) established obligatory suffrage for elections of both houses of parliament (Arts. 64, 68). In some of the German states, prior to the World War, the system of obligatory voting was also in force.

In France, where the rule of obligatory voting has existed since 1875 in the case of the electors who choose the Senate,<sup>16</sup> there has been a movement recently for the extension of the system to all elections. In 1921 Professor Joseph Barthélémy, a member of the Chamber of Deputies, introduced a bill for this purpose and the commission to which it was referred made a favorable report, but

<sup>14</sup> Robson, "Compulsory Voting," *Pol. Sci. Quar.*, vol. XXXVIII (1923), p. 571.

<sup>15</sup> In Amsterdam some 14,000 electors, in this spirit elected a notorious tramp to the city council. *Current History*, June, 1925.

<sup>16</sup> Law of August of 1875, Art. 18.

apparently it never came to a vote in the chamber. The question of introducing compulsory voting in Massachusetts was discussed in connection with the recent revision of the constitution of that state and there appears to be some sentiment in favor of it in England, where 4,650,000 of the 14,000,000 electors abstained from voting in the parliamentary elections of 1922.

**Objections to the Principle of Compulsory Voting.**—The principle of compulsory voting is condemned by nearly all political writers on the ground that it cannot be defended upon considerations either of sound political science or of public policy. It assumes that voting is a public legal duty instead of a privilege or a moral duty. However reprehensible may be the conduct of the citizen who neglects his civic obligations and his public duties as a member of society, it is hardly the province of the state to punish by legal means the non-performance of such duties.<sup>17</sup> The value of universal suffrage depends on its being regarded as at once a privilege and a moral duty. If the exercise of it were required by law, the privilege would, it is contended, be exercised as a mere form and without regard to the public good, very much as it was by the *sans-culottes* of Paris, who were paid for their attendance at the elections during the French Revolution. The effect would be a marked lowering the character of the privilege. Moreover, compulsory votes would be more easily purchasable and there is danger that they might come to be estimated by their market value.<sup>18</sup>

<sup>17</sup> Compare Lieber, "Political Ethics," vol. II, p. 230.

<sup>18</sup> Cf. Bradford, "Lessons of Popular Government," vol. II, p. 187. For a strong criticism of the principle of compulsory suffrage, see Esmein, "Droit constitutionnel" (3d ed.), pp. 216 ff. See also Benoist, "La crise de l'état moderne," pp. 49-55, and Taft, "Popular Government," p. 19, both of whom condemn the system as unsound in principle and difficult of enforcement. But Professor Barthélémy, who has made a careful study of the working of the system of compulsory voting in Belgium, says Belgian sentiment is unanimous that it has proved an effective means of political education.

Mr. Rowson, an English writer, in his article cited above, concludes that the wisdom of compelling electors to vote should be judged not on the basis of whether it is theoretically justified or not, but upon considerations of expediency, that is, whether its practical advantages outweigh the disadvantages. If the penalty imposed does not irritate and cause compulsory voting to be regarded as a species of petty tyranny; if there is a general readiness to obey the law and, the results are as beneficial as they are said to be in Belgium, it might very well be adopted—at least in Great Britain, where the abstentions are so distressingly large.

**Plural and Weighted Voting.**—The modern democratic principle is that every adult man, if not also every adult woman, not disqualified for reasons of character or incapacity, should be entitled to one vote. Does it also require that this vote shall count in the determination of the result the same as the vote of every other elector, or that no elector shall have more than one vote? Modern theory and general practice is in favor of the affirmative view. Systems of plural or weighted voting,—sometimes called differential voting,—however, have not been lacking. In 1893, by an amendment to the constitution, Belgium introduced such a system. Every male citizen twenty-five years of age and a resident at least one year in the commune was allowed one vote; a supplementary vote was allowed to every man who had reached the age of thirty-five years and had legitimate offspring and paid a tax of 5 francs to the state; also to every landed proprietor twenty-five years of age the value of whose land aggregated at least 2000 francs. Two supplementary votes were allowed to every citizen twenty-five years of age who possessed a diploma from an institution of higher learning or a certificate showing the completion of a course of secondary education; or who held or had held a public office or who practiced or had practiced a private profession which presupposed that the holder possessed at least a secondary education. No one, however, might have more than three votes in the aggregate.<sup>19</sup>

In practice the system favored especially the peasants, priests, public officials, and the professional classes, and perpetuated the control of the Catholic party and reduced the strength of the Socialist party, the majority of whose members were entitled to but a single vote.<sup>20</sup> Beginning some time before the World War, a strong demand for the abolition of what was regarded as an undemocratic and unjust system of suffrage, because it gave a majority of the votes to a minority of the voters, became widespread throughout Belgium. Socialist

<sup>19</sup> Constitution, Art. 47; Dodd, "Modern Constitutions," vol. I, pp. 132-133; and Duguit, *op. cit.*, p. 703. For an elaborate study of the history and working of the Belgium system of plural suffrage, see Dupriez, "Le suffrage universel en Belgique," 1901. See also Desjardines, "La liberté politique dans l'état moderne," p. 239 *et seq.*; Barthélémy, "L'organisation du suffrage et l'expérience Belge" (1912); also his "Le problème de la compétence dans la démocratie" (1918), pp. 41-42; and Reed, "Government and Politics in Belgium" (1924), p. 41.

<sup>20</sup> It should be said, however, that large numbers of workingmen had two votes and many who were heads of families had three.

demonstrations and nation-wide strikes were organized and directed against it, and the popular slogan, "one man one vote" was a feature of every election campaign.<sup>21</sup> Finally when the constitution was revised in 1921 one of the democratic reforms which were introduced was the abolition of plural voting.

**Merits of Weighted Voting.**—The Belgian system represented an effort to combine the advantages of universal suffrage with a scheme of what Sidgwick calls "weighted voting," with a view to mitigating the evils believed to be inherent in a system of universal suffrage, by preventing the ignorant and uninstructed mass of the community from overriding the intelligent and more capable few. It rested on the assumption that there are some individuals in the state whose votes ought to be given a greater weight in the choice of public officials than those of the rest, that while every one ought to have a vote, some ought to have more than one. It recognized, in short, that some men are wiser and better fitted to choose, and that some men's opinions should count for more than others' in ascertaining the general will. It was an application of Taine's doctrine that voices should not be "counted"; they should be "weighed." The Belgian system took into consideration the elements of property, education, family relation, and occupation or profession in determining the weight of a man's voice in the government.<sup>22</sup>

**The Objection to Weighted Voting.**—The chief objection to such a system of suffrage lies in the difficulty of finding a just and practical standard or criterion by which the weight of different votes may be graduated. Any scheme for assigning different values to the votes of the property owner, the man of education, the head of a family, the professional man, etc., must be largely arbitrary. The possession

<sup>21</sup> As to these demonstrations, see Schapiro, "The Political Strike in Belgium," *The Independent*, 1913, pp. 1035 ff.

<sup>22</sup> Esmein ("Droit constitutionnel," p. 240) criticizes the method of plural voting as resting on a principle which is a logical contradiction. If, he asks, its purpose is to counteract the evils incident to the incapacity of others would it not be logical to refuse entirely the electoral right to the latter? In admitting the latter to the suffrage the law recognizes in them a capacity. Then why give to others in the exercise of the same function a superior authority? Maeterlinck, who criticized the Belgian system, said it was inconsistent with universal suffrage and in fact led to its logical annihilation. On the subject of plural voting in general see Benoist, "La crise de l'état moderne," pp. 93 ff.

of property, for example, is often the result of accident rather than of thrift, economy, or capacity, and even if it were otherwise, popular opinion is so averse to the basing of political rights upon wealth that the scheme would be hard to defend in a democracy. It is sometimes said in support of the argument that the wealthy have more interests to be protected than the poor and should therefore be given a proportionately larger share in the choice of those who govern.<sup>23</sup> But to this it may be replied that the power of self-help among the rich is correspondingly greater, and hence the need of state protection is less than in the case of the poor. Weighted voting for the wealthy, moreover, tends toward the establishment of class government and government by the wealthy few at that—the most obnoxious of all forms of government. The nature of one's profession or occupation is regarded by some as a fairly just and practical test for determining the weight of a vote. Thus, it is said, an employer is likely to possess more ability and intelligence than an employee; a banker, a merchant, or a manufacturer, more than an artisan; one engaged in a learned profession, more than one engaged in an unskilled trade; and so on.

**Mill's Defense.**—John Stuart Mill, who was an advocate of the scheme of "weighted voting," expressed the opinion that two or more votes might properly be allowed to every person who "exercises any of these superior functions." A system of plural voting in which a superior weight was assigned to the vote of the educated man was strongly recommended by Mill as a "counterpoise to the numerical weight of the least educated." It would be a means, he argued, of offsetting the "more than equivalent evils" of a "completely universal suffrage." In any system providing a widely extended suffrage it might be wise, he said, "to allow all graduates of universities, all persons who have passed creditably through the higher schools, all members of the liberal professions, and perhaps some others who registered specifically in those characters, to give their votes as such in any constituency in which they choose to register; retaining in addition their votes as simple citizens in the localities in which they reside. All these suggestions are open to discussion as to details; but it is evident to me that in this direction lies the true ideal of representative government, and that to work toward it by the best practical contrivances which can be found is the path of real political improvement."

<sup>23</sup> Compare Sidgwick, "Elements of Politics," p. 390.

**Systems of Plural Voting in Other Countries than Belgium.**—In England plural voting was formerly employed in vestry elections and in the elections of poor law guardians. Even now one may cast two votes under certain conditions. Thus one who is an occupier for business purposes of premises worth £10 a year in a constituency other than that in which he resides, may vote in both constituencies. Again the holder of a degree from any one of the universities may vote not only for the election of a member from the constituency in which he resides, but also for the member to which his university is entitled.

For many years the complete abolition of plural voting was a part of the Liberal program and in 1906, when the Liberal party came into power, the ministry brought in a bill to establish the principle of "one man one vote." It passed the House of Commons but was rejected by the House of Lords.<sup>24</sup> The matter was discussed again in 1911 in connection with the Suffrage Act of that year, but the Conservative elements insisted on retaining it as a means of preventing the submergence of the more educated and wealthy part of the electorate. The Liberals finally consented to retain the principle with the restrictions and conditions mentioned above.<sup>25</sup>

In some of the German states, prior to the World War, a system of unequal suffrage existed. Thus the suffrage for the Landtag, or lower chamber of the Prussian legislature, was organized on a three class basis under which the members were chosen individually by colleges of electors in each district who were themselves chosen by voters grouped into three classes according to the amount of the taxes which they paid. The result was to give the wealthier classes the preponderance of representation in the legislature, as it was intended to do. Judged by the standards of modern democracy, it was the most archaic and unjust system of suffrage in the world.<sup>26</sup> The Social Democratic party, although probably in the majority numerically

<sup>24</sup> Lowell, "Government of England," vol. I, p. 215.

<sup>25</sup> Ogg, "Governments of Europe," p. 130.

<sup>26</sup> Under this system it happened in 1903 that in 2159 electoral districts single individuals paid one third of the taxes. In 1893, of the nine Prussian ministers (among them Prince von Bülow), six voted in the third class and three in the second class, among them the historians Treitschke and Von Sybel and Prince Radziwill. See Gerlach, "L'histoire du droit électoral prussien"; Brocard, "La réforme électoral en Prusse, et les partis," *Rev. Pol. et Pirl.*, Feb., 1912, p. 289; Barthélémy, "Les institutions politiques de l'Allemagne contemporaine," p. 70; and Ogg, "Governments of Europe," pp. 661 ff.

Throughout Prussia, was rarely able to elect a single deputy to the Landtag. The same system existed for the election of members of Prussian municipal council<sup>27</sup> and for the election of the legislatures of several of the other German states, notably Saxony until 1909, where each elector had from one to four votes according to his office, fortune, or education.<sup>28</sup>

The system was defended in Germany on the theory that inequality of voting was not inconsistent with true democracy, that in the organization of the suffrage the interests of property as well as numbers ought to be taken into consideration, and that universal equal suffrage would lead to government by those who had the least interest at stake and to the exploitation by them of the wealthier classes.<sup>29</sup> So far as the government of cities was concerned, it was the German theory that a municipal corporation is analogous to a private stockholding enterprise and consequently only those who are stockholders—that is, those who pay taxes—could justly claim the right to vote in the management of the affairs of the enterprise, and that the voting power of those who were entitled to vote should be measured according to the amount of their interests.

**Disappearance of Plural Voting.**—The German constitution of 1919 requires that the legislatures of all the states (*Länder*) composing the *Reich* shall be elected by *equal* suffrage. No one of the states could, therefore, if it desired, reestablish a system of weighted and unequal suffrage.

In Australia, until 1907, a complicated five-class system prevailed, under which the property-owning and tax-paying classes exercised the preponderating influence. Until 1896 only taxpayers could vote, but in that year an additional class was created based on universal suffrage, which elected about one sixth of the members of the chamber. By a constitutional amendment adopted in 1907, however, the five-class system was abolished and virtual manhood suffrage was established.

<sup>27</sup> See Munro, "Government of European Cities," pp. 128 ff., and Brooks, "The Three-Class System in Prussian Cities," *Municipal Affairs*, vol. II, p. 396 ff.

<sup>28</sup> As to the suffrage in the German states prior to the World War, see Dodd, "Constitutional Developments in Foreign Countries," *Amer. Pol. Sci. Review*, vol. IV (1910), pp. 337 ff.

<sup>29</sup> See the defense by various German scholars in "Modern Germany in Relation to the Great War" (English translation by Whitelock, 1916), especially the observations of Professor Schmoller, p. 213.

for the election of all representatives to the popular chamber.<sup>30</sup> As a consequence of the important constitutional changes that have been made in Europe since the World War the system of plural or weighted voting has disappeared everywhere except in England, where, as stated above, it still survives in very limited form. In so far as it permits an individual to vote both in the district in which he is domiciled and in another district in which he owns real estate, the principle is defensible on the theory that taxation and representation are conditioned the one upon the other.

**Proposed Family Voting in France.**—In France during the World War a considerable propaganda was carried on for the introduction of a system of family voting under which the head of the family should have, besides his personal vote, a vote for his wife and one for each of his children. The principal argument in favor of the scheme was that it would prove an efficacious means of encouraging, by the reward which it offered, larger families and thus promote the increase of a declining population. Moreover, it was argued that a parliament elected by such a system would represent the nation on its true basis, which it was assumed was the family rather than the individual. Bills providing for such a system were introduced at various times in the Chamber of Deputies, one of them in 1920 having been signed by 260 deputies.<sup>31</sup>

**In Japan.**—In the debates on the Japanese electoral law of 1925 a strong plea was made in favor of confining the parliamentary suffrage to heads of families, whether males or females.<sup>32</sup>

## II. THE CONSTITUTION OF THE ELECTORATE

**Early Restrictions.**—Regarding the constitution of the electorate—who should enjoy the franchise and who should be denied it—both theory and practice have materially varied in different epochs and

<sup>30</sup> Dodd, "Modern Constitutions," vol. I, p. 77, note 5. Also his note in *Amer. Pol. Sci. Rev.*, vol. IV, p. 330.

<sup>31</sup> Duguit, "Traité de droit const." (2d ed., 1923), vol. II, p. 451. There is a considerable French literature dealing with the subject. See especially Enfielet, "Le vote familial" (1923); Landrieu, "Le vote familial" (1923); Fosse, "Le vote familial" (1924), and an informing article by Gooch, "Family Voting in France," *Amer. Pol. Sci. Review*, vol. XX (1926), pp. 299 ff.

<sup>32</sup> See Quigley, in *Amer. Pol. Sci. Rev.*, vol. XX (1926), p. 395.

in different countries. Perhaps the most remarkable phenomenon in the history of democracy in the past century has been the steady evolution of the suffrage from a narrow, frequently unequal, and indirect system to one which is now virtually universal, direct, and equal. One restriction after another, religious, economic, racial, and sexual, have disappeared before the rolling tide of democracy until to-day few barriers remain.

In the early part of the nineteenth century important restrictions were universal even in countries like France and the United States.

**Restrictions in France.**—In France under the Restoration, in 1814, the payment of a tax amounting to 300 francs and the attainment of the thirtieth year of age were required as conditions to the exercise of the suffrage.<sup>33</sup> The Revolution of 1830 brought about a reduction from 300 to 200 francs in the amount of the tax contribution required of electors and the lowering of the age requirement to twenty-five years for members of the lower chamber. During both the period of the Restoration and the July monarchy, the number of electors in proportion to the population was exceedingly small, and this became the cause of widespread popular discontent. A movement for direct universal manhood suffrage became active about 1840, and it triumphed in 1848 with the establishment of the second republic, the constitution of which declared that suffrage should be direct and universal and that all Frenchmen twenty-one years of age and in the enjoyment of their civil rights should be electors, regardless of the amount of their property. This system was continued under the second empire and under the third republic, and is still in existence.

**In England and the United States.**—In England, until 1832, the parliamentary franchise was limited in the counties to freeholders whose landed property was of the annual value of forty shillings; and in the eighteenth century the value of forty shillings was many times what it is to-day.<sup>34</sup> In the English colonies of America freehold qualifications for voting were common in the seventeenth and eighteenth centuries, and in a number of them religious qualifications also existed. The Massachusetts charter of 1691, for example, limited the suffrage

<sup>33</sup> Charter of 1814, Art. 35. For excellent reviews of the history of the suffrage in France, see Duguit, "Droit const." (1st ed.), vol. II, pp. 175 ff., and Esmein, "Droit const." (5th ed.), pp. 312 ff.

<sup>34</sup> See Rogers, "Economic Interpretation of History," p. 32.

to possessors of freeholds of the annual value of forty shillings or of other estates to the value of forty pounds.<sup>35</sup> Likewise the early state constitutions generally restricted the right of voting to the property-owning classes. In some, the New Hampshire, Delaware, Georgia, and Pennsylvania, the payment simply of a tax was required, but in others the suffrage was restricted to owners of land of an annual value ranging in amount from three pounds in Massachusetts to fifty pounds in New Jersey.<sup>36</sup>

With the rapid spread of democratic ideas after 1820, however, restrictions upon the suffrage began to disappear, and before the middle of the century practically the entire adult white male population was in the enjoyment of the franchise, though here and there a small property qualification was required. Only one or two of the older states restricted the right to vote to those who could read and write.

**In Germany and Other Countries.**—In Germany under the imperial constitution of 1871 what amounted to universal manhood suffrage prevailed for elections to the Reichstag, although voters were required to be 25 years of age. But as pointed out above, the suffrage for state elections in Prussia, Saxony, and other states was restricted, unequal, and indirect. In Austria until 1907 only a small fraction of the lower chamber was elected by universal suffrage. In Hungary the suffrage was constituted upon the basis of a complicated system of property, tax-paying, or educational qualifications so adjusted as to insure the overwhelming domination of the Magyar race in parliament. In Norway universal male suffrage was not introduced until 1898. In Belgium until 1893 there was a tax-paying qualification, the effect of which was to exclude all but about 79,000 of the men in a population of 4,000,000.<sup>37</sup> In that year the restrictions were reduced, but the consequence of the system of plural voting introduced at the same time and described above, the voting strength of the poorer classes was kept far below what it would have been under a system of equal voting.

<sup>35</sup> See Courtlandt F. Bishop, "History of Elections in the Colonies," ch. 2; also Lalor, "Encyclopedia of Political Science," Art. "Suffrage."

<sup>36</sup> For a summary of the suffrage requirements in the early state constitutions, see an article entitled "The First State Constitutions," by W. C. Morey in the "Annals of the American Academy of Political and Social Science," vol. IV, pp. 20-22, also Schouler, *Constitutional Studies*, pt. I, ch. 4.

<sup>37</sup> Reed, *op. cit.*, p. 36.

In Italy until 1912 there was a tax-paying and an educational qualification the effect of which disfranchised all but about 3,000,000 of the men in a total population of more than 34,000,000. With the removal of these restrictions in 1912 the number of voters rose to more than 5,000,000.<sup>38</sup> In Japan until 1925 there was a tax-paying qualification, the effect of which was to disfranchise a large majority of the adult male population.<sup>39</sup>

**Early Objections to Universal Suffrage.**—The long movement which finally triumphed in the general establishment of universal manhood suffrage had many opponents who attacked it as unwise and dangerous. The historian Macaulay in 1820 argued that universal suffrage would, upon utilitarian principles, lead to one "vast spoliation" and that if it were ever put into effect in England "a few half naked fishermen would divide with the owls and foxes the ruins of the greatest of European cities."<sup>40</sup>

Lecky in his "Democracy and Liberty," as pointed out in an earlier chapter, dwelt upon what he conceived to be the dangers of government by the ignorant masses and pleaded for a suffrage based in part upon education and property. The legislature, he said, is essentially a machine for taxing, and it should be chosen by an electorate restricted mainly to those who contribute the taxes.<sup>41</sup> "One of the great questions of politics in our day," he said, "is coming to be, whether, at the last resort, the world should be governed by its ignorance or by its intelligence." The idea that the "ultimate source of power should belong to the poorest, the most ignorant, the most incapable, who are necessarily the most numerous, is a theory which assuredly reverses all the past experiences of mankind."<sup>42</sup> The election returns, Lecky went on to say, very rarely represent real public

<sup>38</sup> Ogg, *op. cit.*, p. 532. But since the advent of Mussolini new restrictions have been introduced.

<sup>39</sup> As to the details see Quigley in *Amer. Pol. Sci. Review*, vol. XX (1926), p. 393.

<sup>40</sup> Quoted by Fisher, "The Republican Tradition in Europe," p. 325.

<sup>41</sup> Lecky defended the restricted suffrage which prevailed in England before 1867. It is doubtful, he said, whether the world ever saw a better constitution than that of England from 1832 to 1867. "Few parliamentary governments," he declared, "have ever had more talent or represented more faithfully the various interests and opinions of a great nation or maintained under many trying circumstances a higher level of political purity and patriotism." "Democracy and Liberty," vol. I, p. 18. <sup>42</sup> *Ibid.*, vol. I, p. 21.

opinion because under a system of universal suffrage there are multitudes who never contribute anything to public opinion, but cast their votes as directed by other individuals or organizations, or at haphazard, when they are ignorant of the candidates and issues. One man "will vote blue or yellow" because his father voted that way, without reference to the principles involved; others are governed by prejudice, and so on. "A bad harvest or some other disaster over which the government can have no more influence than over the march of the planets," he observed, "will produce a discontent that will often govern dubious votes and may perhaps turn the scale in a nearly balanced election." Lecky predicted that the day would come when it will appear to be "one of the strangest facts in the history of human folly" that the theory that the best way to improve the world and secure national progress is by placing the government under the control of the least enlightened classes should have once been regarded as liberal and progressive.

In considering the attitude of the ignorant masses toward scientific progress, Sir Henry Maine, one of the most powerful critics of popular government, went to the length of asserting that "universal suffrage, which to-day excludes free trade from the United States, would certainly have prohibited the spinning jenny and the power loom. It would certainly have prohibited the threshing machine. It would have prevented the adoption of the Gregorian calendar, and it would have restored the Stuarts. It would have proscribed the Roman Catholics with the mob which burned Lord Mansfield's house and library in 1780, and it would have proscribed the Dissenters with the mob which burned Dr. Priestley's house and library in 1791."<sup>43</sup> Sir James Stephen, referring to the "accepted theory of government" which appeared to be "that everybody should have a vote," declared that he for one must object to such a theory. The theory and practice of universal suffrage he concluded, tended "to invert what I should have regarded as the true and natural relation between wisdom and folly."<sup>44</sup>

The Belgian publicist Emile Laveleye, another critic of universal suffrage, while admitting its advantages in dignifying the individual and affording a means for the political education of the masses, yet

<sup>43</sup> "Popular Government," p. 36.

<sup>44</sup> "Liberty, Equality, Fraternity," pp. 239-243.

asserted that under a parliamentary system of government it would lead to the "loss of liberty, of order, and of civilization."<sup>45</sup>

**The Triumph of Universal Suffrage.**—But in the face of the democratic tide which as Stephen admitted was already sweeping onward with irresistible force even in England at the time he wrote (1873), these pleadings for a restricted suffrage were voices crying in the wilderness. There is no evidence that the enfranchisement of the masses in countries like England and America is likely to produce the dire results which Lecky, Maine, and Stephen prophesied. Nevertheless, their warnings concerning the dangers of universal suffrage are not to be taken lightly. The truth of much of what they said regarding the incapacity of the ignorant masses for self-government is abundantly established by reason and the experience of the past. If government by the whole people is to be a success, they must be fitted and made capable for self-government. To vest the power of choosing those who are to rule the state in the hands of the incapable and unworthy classes, as Bluntschli justly remarked, would mean state suicide. Give the suffrage to the ignorant, said Laveleye, and they will fall into anarchy to-day and into despotism to-morrow.<sup>46</sup> Whatever the truth in either proposition, we should do well to heed the saying of John Stuart Mill that universal teaching must precede universal enfranchisement.

### III. WOMAN SUFFRAGE

#### **Arguments against the Political Enfranchisement of Women.**

--Hand in hand with the spread of democracy and the extension of the suffrage to the masses of the male population has gone the movement for the political enfranchisement of women. At the time of the French Revolution, when the dogma of universal suffrage was at its height of popularity, a petition was presented to the National Assembly asking for an extension of the right of voting to women, and it received the support of men like Condorcet and others. It was said that if voting was a natural right of the citizen, it ought not to be denied to women. For a long time, however, after the democratic movement had resulted in the political enfranchisement of the masses

<sup>45</sup> "Le gouvernement dans la démocratie," vol. II, pp. 51-52.

<sup>46</sup> *Ibid.*, vol. I, p. 326.

of the male population, women were wholly excluded from the suffrage in all countries, even the most democratic. Restriction of the right to vote exclusively to males was not regarded as at all inconsistent with the principle of democratic government, or with the doctrine of the consent of the governed.

The arguments against the political emancipation of women are no doubt familiar to the readers of this book and do not therefore need to be reviewed in detail. Briefly stated, one of the main reasons advanced against it was the allegation that the active participation of women in political life would tend to unsex them and destroy the qualities which distinguish them from men.

Those who held this view maintained that the function of maternity is woman's peculiar mission, and that the home rather than the political arena is her natural sphere. Her nature unfitst her for engaging in political affairs; if she allows herself to be drawn away from the home by the distractions of the political campaign, the household of which she is the guardian, and the young which it is her high mission to bear and rear, will be neglected. In short, the exactions of political life are inconsistent with the duties of child-bearing and the rearing of families. Woman suffrage strikes at the integrity of the home and leads to the lowering of family life, said Bluntschli, for upon the wife more than upon the husband depends the welfare of the family. It is impossible, he said, for man to revere and honor a "political woman." Only man, he quoted Aristotle as saying, was intended for political life. Moreover, since the family cannot be expected always to vote as a unit, female suffrage would tend to introduce discord and dissension in the home by setting each member against the other. On the other hand, if the wife voted according to the advice or dictation of the husband, her vote would be merely a duplication of his, and nothing would be gained by giving her the ballot. In this case, said Bluntschli, it would be wiser to give the husband two votes, leaving to the wife the right of exerting her powerful influence but without the duty and responsibility of participating in the election herself. Both Bluntschli and Laveleye maintained that the enfranchisement of women in Catholic lands would open the way to the rule of the Jesuit class, since their votes would be effectually controlled by the priests of the Catholic church. The *Kulturkampf* struggle between state and church in Germany, Bluntschli declared, abundantly showed

that the opinions of women were easily controlled by Catholic priests and that had they possessed the suffrage equally with men the struggle would have terminated in favor of the church.<sup>17</sup> This fear is one of the reasons why women are still unenfranchised in France and Italy.

It is said by some opponents of woman suffrage that since women are physically incapable of discharging all the duties and obligations of citizenship which devolve upon males, they have no right to demand the privileges. They cannot serve in the army or the militia or the posse comitatus, or serve the state in many other capacities without violating the proprieties and safeguards of female virtue. Nevertheless, as Sidgwick aptly remarked, the military argument has no force in states where military service is mainly voluntary and where men who are not trained soldiers are rarely called into the service.<sup>18</sup>

**Defense of Woman Suffrage.**—In answer to these and other arguments it was replied that differences of sex do not constitute a logical or rational ground for granting or withholding the suffrage to a citizen who is otherwise qualified; in short, the criterion for determining the right to vote is not physical, but moral and intellectual. "I see no adequate reason," said Sidgwick, "for refusing the franchise to any self-supporting adult, otherwise eligible, on the score of sex alone; and there is a danger of material injustice resulting

<sup>17</sup> Bluntschli, "Politik," bk. X, ch. 2; Laveleye, "Le gouvernement dans la démocratie," vol. II, pp. 62 ff. To the same effect compare Treitschke ("Polities," vol. I, pp. 252 ff.), who ridiculed the whole idea of woman suffrage and referred to the limited enfranchisement of women in Canada as one of those "frivolities which would not have been ventured upon if people had not descented them to themselves as mere shams to curry favor with the masses." Esmein, likewise a strong opponent of suffrage for women, says there has been a natural division of labor and of functions between the sexes from the beginning of time, and that to man belong the duties of public life and to woman the guardianship and care of domestic life. Education and hereditary influences have, he declares, developed and fixed with each the corresponding aptitudes. "True progress," says Esmein, "consists not in drawing women into public life or into the professions hitherto reserved to men, but in rendering marriage more easy and safe and in delivering them from the servitude of manual labor." "Droit constitutionnel," p. 363. A strong argument against woman suffrage was made by Professor A. V. Dicey in a little book entitled "Letters to a Friend on Votes for Women" (1890), and by Elihu Root in the New York Constitutional Convention of 1891. A bibliography of the more important literature against the enfranchisement of women may be found in Merriam, "American Political Ideas," p. 91.

<sup>18</sup> "Elements of Politics," p. 385.

from such refusal so long as the state leaves unmarried women and widows to struggle for a livelihood in the general industrial competition without any special privileges or protection."<sup>49</sup> In short, one capable citizen is as much entitled to participate in the choosing of those who govern as another, and sex should have nothing to do in determining the right.<sup>50</sup>

John Stuart Mill, one of the first and most powerful advocates of woman suffrage, said : "I consider it entirely irrelevant to political rights, as difference in the color of the hair. . . . If there be any difference, women require it more than men, since, being physically weaker, they are more dependent on law and society for protection."

**The Argument of Self-Protection.**—In the second place, it was urged that women should be given the franchise as a means of self-protection - not necessarily that they may govern, but that they may defend themselves against the unjust class legislation to which it is alleged they are frequently subjected. Laws concerning the rights of women, remarked Laveleye, ought not to be made by men alone. In short, considerations of justice require that government of both men and women should not be government by men alone. The force of this argument possesses added weight on account of the character of modern industrial and social conditions under which women live. They are to-day competing with men side by side in nearly every trade and occupation and in many of the learned professions. Therefore, the plea that the wage-earner should be given the ballot as a defense against his employer applies with equal, if not stronger, force to the argument for woman suffrage.

**Argument Based on Logic.**—In the third place, it was urged that the political enfranchisement of women ought to follow naturally and logically their civil enfranchisement. Nearly everywhere the old civil and legal disabilities of women have disappeared ; they are now capable of owning property, entering into contracts, and engaging in all gainful occupations equally with men. The arguments upon which they were formerly denied equal civil rights with men are largely the same as those which were recently relied upon to justify the denial to them of political rights and privileges. If women are capable of managing their own business affairs, of entering into contractual rela-

<sup>49</sup> *Op. cit.*, p. 384.    <sup>50</sup> *Op. cit.*, p. 384.

tions, of competing with men in the professions and occupations, of teaching them in the schools and colleges, they are capable of sharing with men the exercise of political privileges and rights. It is difficult indeed to defend a theory which permits the shiftless, improvident, and non-taxpaying male to have a voice in legislation, particularly when its effect is to impose burdens upon the taxpayers, but denies a vote to the self-supporting unmarried woman who owns property and contributes to the financial support of the state.

**The Purification Argument.**—In the fourth place, it was argued that the admission of women to a share in the management of political affairs would injure to the common good by introducing into political life a purifying, ennobling, and refining influence that not only would tend to elevate the tone of public life and bring about more wholesome political conditions in society, but also would insure better government. In other words, society would gain by the change. Many instances were cited by the advocates of suffrage for women to show that in countries where they had been given the franchise they had wielded a decisive influence in securing the enactment of advanced social legislation, particularly as regards such matters as child labor, the employment of women in factories, the public health, tenement houses, the sale of liquor, public libraries, better educational facilities, pure food legislation, and similar matters. Nobody, said Mill, pretends to think that women would make a bad use of the suffrage. "The worst that can be said," he continued, "is that they would vote as mere dependents at the bidding of their male relations. If it be so, let it be. If they think for themselves, great good will be done, and if they do not, no harm. It is a benefit to human beings to take off their fetters, even if they do not desire to walk. It would already be a great improvement in the moral position of women to be no longer declared by law incapable of an opinion, and not entitled to a preference, respecting the most important concerns of humanity. There would be some benefit to them individually in having something to bestow which their male relatives cannot exact, and are yet desirous to have. It would also be no small thing that the husband would necessarily discuss the matter with his wife, and that the vote would not be his exclusive affair, but a joint concern."

Regarding Esmérein's argument that the exclusion of women from voting had its foundation in the natural law of the division of labor

between the two sexes, Professor Duguit pointed out that the law invoked merely leads to this, that upon neither men nor women may be confided functions which their sexual nature prevents them from performing. It would be necessary to prove, therefore, that the physical and intellectual constitution of women rendered them incapable of exercising political functions—a proof which no one had produced.<sup>51</sup>

**Early Extensions of the Suffrage to Women.**—Mill, in 1861, prophesied that “before the lapse of another generation the accident of sex, no more than the accident of skin, will be deemed a sufficient justification for depriving its possessor of the equal protection and just privileges of a citizen.” The prophecy proved true in part, and before his own generation had passed, experiments with woman suffrage on a limited scale were already being made in the United States. Once introduced, it spread rapidly; organized movements for the political enfranchisement of women, some of which were international in scope were formed in America and Europe and before the outbreak of the World War the movement had achieved notable successes in many countries. In the United States women had acquired an equal right to vote with men in a number of western states; and in others, the right to vote in school elections, municipal elections, or, in the case of taxpayers, on proposed bond issues. In Great Britain, they enjoyed the franchise equally with the men in all except parliamentary elections and were eligible to most local offices. Both the Conservative and Liberal parties at different times proclaimed themselves to be in favor of extending the privilege to parliamentary elections, and the rising Labor party made the enfranchisement of women a leading feature of its program.

In Australia women were given the full right of voting equally with men in the Commonwealth elections and were made eligible to seats in parliament. In most of the Australasian states, including Tasmania, and in New Zealand, they were put on a footing of equality with men in respect to voting in state elections. In all the Canadian provinces widows and spinsters acquired the franchise either in school or municipal elections or both, and in some of the northwest provinces no distinction was made between married and unmarried women.

In Finland in 1907, all women 25 years of age who paid a small

<sup>51</sup> *Op. cit.* (2d ed.), vol. II, p. 455.

tax were given the right to vote, the effect of which was to enfranchise almost 300,000 women. In 1908 the women of Denmark were given the right to vote in municipal elections and in 1915 the right was extended to all elections.

**Spread of Woman Suffrage since the World War.**—The events of the World War gave a great impetus to the movement for the political enfranchisement of women everywhere, even in countries where it had formerly made little progress. During the war the women of most belligerent countries played an important rôle in the prosecution of the war. They filled many places left vacant by men who served in the armies; they worked in government offices and in ammunition factories, and contributed in numerous ways to the advancement of the cause for which the nations were fighting. To many minds their full and equal political enfranchisement with men appeared to be a just and well-earned reward. In consequence, there was a general extension of the suffrage to women throughout America and Europe. In Great Britain by the Representation of the Peoples Act of 1918 the parliamentary franchise<sup>52</sup> was conferred upon all women over 30 years of age who themselves, or whose husbands, were entitled to be registered as local government electors. The effect of this law was to add about 6,000,000 new voters to the British electorate. Ten years later (1928) the age requirement for women voters in Great Britain was reduced to 21 years, the same as for men. The Russian Soviet constitution of 1918 (Art. 64) conferred equal suffrage upon women who had attained their 18th year. By constitutional amendment in the United States (1919) women were put on an equal footing with men in all state, national, and local elections. In Germany, where before the war the political enfranchisement of women found few advocates, all women over 20 years of age were by the constitution of 1919 (Art. 22) given the full and equal suffrage with men in the parliamentary elections; and the Prussian constitution of 1920 (Art. 4) gave the same right to women in the state elections. The new constitutions of Austria (Art. 26), Czechoslovakia (Art. 9), and Poland (Art. 12) did likewise. That of Yugoslavia (Art. 70) left the matter to the legislature with an injunction that it should provide for woman suffrage. The revised Belgian constitution of 1921 (Art. 47) con-

<sup>52</sup> As stated above, English women already had the local franchise.

tained a transitory provision conferring the suffrage upon unmarried widows of soldiers who died during the war, those of Belgian husbands who were shot or killed by the enemy, and women who were condemned by the enemy during the war to imprisonment or internment on account of their political motives. The amendment empowered the legislature by a two-thirds vote to extend the right of suffrage to women generally under the same conditions as applied to men. The constitution of Luxemburg (1920) proclaimed the political equality of both sexes. The constitution of the Irish Free State (1922) confers the suffrage equally on men and women 21 years of age, and of Rumania (1923) and of Spain (1931) make no distinction between men and women. By the Hungarian electoral law of July 5, 1925, women 30 years of age who have attended school for six years (four years in case of mothers of three children) and those who earn their own livelihood were made voters.<sup>53</sup> Naturally the enfranchisement of women has been followed by their election to public office in nearly all countries where they have acquired the suffrage.<sup>54</sup>

**Countries in which Women Are Unenfranchised.**—There still remain a few countries in Europe in which women have not yet acquired the suffrage—at least not equal suffrage with men. They are the Netherlands, Bulgaria, Yugoslavia, Portugal, Italy,<sup>55</sup> and France. In none of the countries of Latin America and Asia has woman suffrage been introduced, even in limited form, although a strong plea was made in the Japanese parliament in 1925 in favor of the enfranchisement of women who were heads of families. In France women who are employers may vote for the election of members of the councils of *prud'hommes*, and those who are engaged in business are entitled to vote for the election of judges of the commercial courts. By recent legislation they have been made eligible to practice law, to serve on the consultative labor councils, and to participate in the election of members of the cantonal and departmental councils for technical instruction.<sup>56</sup>

<sup>53</sup> Graham, *Amer. Pol. Sci. Rev.*, vol. XX (1926), p. 386.

<sup>54</sup> See as to this Shepard, "Women Members of European Parliaments," *ibid.*, pp. 379 ff.

<sup>55</sup> Under the Mussolini régime women were given the franchise in municipal elections; but the subsequent virtual abolition of municipal elections leaves the women of Italy without political privileges.

<sup>56</sup> Duguit, *op. cit.*, vol. II, p. 369.

Recently the feminist movement in France has grown in influence and numbers and the demand for full parliamentary and local suffrage has become widespread. On May 20, 1919, the Chamber of Deputies voted by a large majority a resolution proclaiming the electoral equality of all French citizens without distinction of sex and again in 1932 it voted to extend the suffrage to women but each time the proposal was repealed by the Senate. Professor Duguit, a stanch advocate of woman suffrage commenting on the great rôle played by the French women in the economic and public life of France during the World War, has lately expressed the opinion that the present exclusion of women from the suffrage is only temporary and contingent, and that the evolution of modern society everywhere toward the political enfranchisement of women is profound and irresistible.<sup>57</sup> There is at the present time a strong organized movement in France for the enfranchisement of women.

#### IV. EXISTING SUFFRAGE REQUIREMENTS

**Exceptions to the Principle of Universal Suffrage.**—While the principle of what is commonly described as universal suffrage—at least for male citizens and in the great majority of countries for women also—has now become the general rule, it is hardly necessary to say that the principle is not absolute. No one, as Judge Story well remarked, not even the most strenuous advocate of universal suffrage, has ever yet contended that the privilege should be absolutely universal; and no one has ever been sufficiently visionary to maintain that all persons of every age, degree, and character should be entitled to vote in all elections for all public officers.<sup>58</sup> As a matter of fact, all states, even the most democratic, restrict the suffrage to those who by reason of their maturity of age, moral character, and degree of intelligence are believed to be capable of exercising the privilege. In fact, as Barthélemy remarks, the electorate is the *élite* of the population. Most states deny the privilege to minors,<sup>59</sup> insane persons, and idiots;

<sup>57</sup> *Op. cit.*, vol. II, p. 455.

<sup>58</sup> "Commentaries," vol. I, p. 412. Compare also Bluntschli, "Politik," n. 422.

<sup>59</sup> The age requirement varies. For the German imperial elections and the Prussian elections it was formerly 25 years; but the new constitutions, as does that of Austria, require the attainment of the 20th year only. The requirement in most countries is 21 years, but the Russian Soviet constitution fixes it at 18 years. In Finland and Sweden it is 24 years, and in Denmark 30. In Hungary women voters must be 30 years of age and in Italy this is the requirement for illiterate

as pointed out above, a goodly number still exclude women wholly or in part; in most countries the voter must be in possession of his full civil rights; and sometimes persons under guardianship are disqualified. In Brazil members of monastic orders are disqualified (Const. Art. 70). Practically all states debar those who have been convicted of grave crimes, including corrupt practices at elections; most of them exclude those who have to be supported by the state;<sup>60</sup> some withhold the right from bankrupts; others deny the privilege to vagrants and even to worthy persons who do not have a fixed residence within the electoral district; some exclude the holders of certain offices, particularly those whose duties are connected with the management of elections; most European countries exclude persons in the active military service (but not the reserve corps); nearly everywhere voters who are not properly registered are deprived of the exercise of the privilege, and a period of residence in the state or voting district is required. A few debar persons who do not own property or pay direct taxes to the state; generally also aliens are excluded.<sup>61</sup>

Soviet Russia, as is well known, goes to the extreme limit of confining the electoral privilege to the working classes, peasants, and soldiers, and of expressly disfranchising employers of workingmen hired for profit, recipients of income from other sources than their own labor, merchants, traders, commercial brokers, the clergy, monks, and others.<sup>62</sup>

**Educational, Property-Owning, and Tax-Paying Tests.**—Many writers have favored some sort of educational or property-owning males. A few countries make a distinction between the age requirements for the electorate of the two chambers. Thus in Czechoslovakia voters for members of the lower chamber must be 21 years of age whereas those for the upper house must be 26, while in Rumania it is 21 years and 40 years respectively. There would seem to be no substantial reason for some of these distinctions. Barthélémy ("Le problème de la compétence," p. 31) points out that the rule which permits voting at 21 years of age produces grave inequality in France, where the mass of young men are obliged to serve two years in the army beginning with the 21st year and during this period are deprived of the electoral privilege, whereas those who escape military service are not thus disfranchised.

<sup>60</sup> In Chile (Const. Art. 8), persons under indictment for an offense punishable corporally are disqualified.

<sup>61</sup> But in 1914 aliens who had formally declared their intention of becoming citizens of the United States were qualified voters in nine states. During and subsequent to the war, however, the number was reduced to four.

<sup>62</sup> Constitution of the Russian Socialist Federated Soviet Republic, 1918, Article 64.

test, and advocates of such requirements are not lacking to-day. One of the best-known of these was John Stuart Mill, who in his "Considerations on Representative Government" said, "I regard it as wholly inadmissible that any person should participate in the suffrage without being able to read and write, and, I will add, perform the common operations of arithmetic. . . . No one but those in whom *a priori* theory has silenced common sense will maintain that power over others, and over the whole community, should be imparted to people who have not acquired the commonest and most essential requisites for taking care of themselves. . . . It would be eminently desirable, that other things besides reading, writing, and arithmetic should be made necessary to the suffrage; that some knowledge of the conformation of the earth, its natural and political divisions, the elements of general history and of the history and institutions of their own country, could be required of all electors." Mill, however, properly maintained that where the suffrage is made to depend upon ability to read and write, the state should provide as a matter of justice the means of attaining these accomplishments without cost to the poor, otherwise the requirement becomes a hardship. Mill also defended tax-paying qualifications as legitimate even in a democratic state. "It is important," he asserted, "that the assembly which votes the taxes, either general or local, should be elected exclusively by those who pay something towards the taxes imposed. Those who pay no taxes, disposing by their votes of other people's money, have every motive to be lavish and none to economize. . . . The voting of taxes by those who do not themselves contribute is a violation of the fundamental principle of free government; representation should be coextensive with taxation."

Lecky, Sir Henry Maine, Sidgwick, Laveleye, Bluntschli, Treitschke, and other well-known political writers held similar opinions. In practice such requirements were formerly not uncommon. In Italy until 1912 all persons who were unable to read and write and who did not pay a small tax were excluded from voting-qualifications which disfranchised more than 90 per cent of the adult male population of the country. In that year these restrictions were removed, although the minimum age requirement for illiterates was fixed at thirty years, whereas the attainment of the 21st year is sufficient for literates. As already stated above, Japan until 1925 had a tax-paying requirement which disfranchis-

ed a large portion of the population. The present constitutions of Brazil (Art. 70) and Chile (Art. 7) expressly exclude illiterates. As a consequence of the Brazilian requirement, the number of voters registered at the time of the presidential election in 1922 was only 1,305,000 out of a total population of more than 30,000,000.<sup>63</sup> Under the Hungarian electoral law of 1925 male voters must have had at least three years in the primary schools and females six. In the United States ability to read and write has been required for many years in the states of Connecticut, Massachusetts, New Hampshire, Maine, Delaware, North Dakota, Wyoming, California, and Washington; and for some years also in New York, Arizona, and Oregon. In this list also belong southern states named in the following section.

In Porto Rico ability to read and write is required, and in the Philippine Islands voters must be owners of real estate worth 500 pesos, pay taxes to the amount of 50 pesos annually, or be able to read Spanish, English or some native language.

**Negro Suffrage.**—In the United States prior to the Civil War only white men could vote in the southern states and in some of the northern states, but the Reconstruction Acts gave the vote to southern negroes, and the disfranchisement of the negro race, as such, was ended by the fifteenth amendment to the federal constitution (1870). In many southern states, however, the negroes were so numerous that the dominant white party favored educational and other restrictions to exclude most of them from the franchise. Mississippi in 1890 took the initiative and adopted a new constitution which required ability either to read the text of the constitution or to understand it when read to the voter by an election officer. South Carolina followed her example in 1895, but with the modification that an illiterate person who was the owner of at least \$300 worth of property should not be disfranchised. Louisiana, Alabama, North Carolina, Virginia, Oklahoma, and Georgia followed with restrictions based on similar principles. In several of these states, however, the educational qualification did not apply to those who were voters in 1867 (when the negro race was still unenfranchised), or to their descendants (the so-called "grandfather clause"), or to those who served in the army or navy during the Civil War.

<sup>63</sup> James, "The Constitutional System of Brazil," p. 56.

In a number of these states the payment of a poll tax is required (as it is also in Arkansas and Tennessee),<sup>64</sup> while in others it is an alternative to the educational requirement. These restrictions were contested as being in violation of the fifteenth amendment to the federal constitution, but so far as the educational and tax-paying requirements were concerned their constitutionality was upheld by the United States Supreme Court.<sup>65</sup> The so-called "grandfather" provisions were, however, pronounced unconstitutional.<sup>66</sup>

In some of the British possessions educational or property qualifications are required for reasons similar to those which led to their adoption in the southern states of the American Union. Thus in Natal, the Transvaal and the Orange River Colony the blacks are entirely disfranchised, and in Barbados they are largely so, as a result of a high property-owning requirement. In Cape Colony these are restrictions which debar large numbers of them, and their complete disfranchisement is widely demanded.

**Merits of the Literacy Test.**—Leaving aside states in which there is a large black population and in which educational tests are defended as means for the protection of the white population against the rule of the colored race—a legitimate measure of self preservation, according to many writers,—we may consider the merits of property-owning and educational qualifications in those states in which no such defense can be invoked. Stated in simple terms the question comes to this: shall a normal adult citizen of the community, of good moral character not otherwise disqualified, be denied a share in the government to which he is subject, for the reason that he does not possess the elements of an education, is not a property owner, and does not contribute by the payment of taxes to the maintenance of the

<sup>64</sup> In Pennsylvania, the payment of a county tax is still required—the only northern state, apparently, in which there is a tax-paying qualification.

<sup>65</sup> *Williams v. Mississippi*, 170 U. S. 213 (1898).

<sup>66</sup> *Guinn v. the United States*, 238 U. S. 347 (1914). As to educational qualifications generally in the United States see Phillips, "Educational Qualifications for Voters," *Univ. of Colorado Studies*, vol. II (1906), pp. 52 ff.; and Haynes, "Educational Qualifications for the Suffrage in the United States," *Pol. Sci. Quar.*, vol. XIII (1898), pp. 495 ff. As to the restrictions upon negro suffrage in the South, see Rose, "Negro Suffrage; the Constitutional Point of View," *Amer. Pol. Sci. Rev.*, vol. I (1906), pp. 17 ff.; Gaffney, "Suffrage Limitations at the South," *Pol. Sci. Quar.*, vol. XX (1905), pp. 53 ff.; and the illuminating chapter on "Negro Suffrage in the South," by W. Roy Smith in Garner (editor), "Studies in Southern History and Politics" (1914), ch. X.

government which aids and protects him? There ought to be no difference of opinion that the voter should be sufficiently "educated" to be able to exercise the electoral function intelligently, but when we have laid down this apparently simple proposition we are still far from a definite workable principle. The electoral function varies in the degree of its complexity from the choice of a local officer to the election on the same ballot of several score of officers, local, state, and national; from voting on a proposed bond issue for the building of a schoolhouse, to voting on thirty or forty proposed laws, some of which only lawyers or other specialists are capable of understanding. To insist that the voter should be sufficiently educated to cast a really intelligent ballot in some of the referendum elections that have taken place in the United States would probably debar 90 per cent of the adult population from exercising the suffrage. John Stuart Mill, as pointed out above, thought no person should be allowed to vote who was unable to read and write and perform "the common operations of arithmetic," and most of the educational tests that have been adopted have been based on the assumption that ability to read or write, or both, is evidence of capacity to vote intelligently and wisely; that it is a true measure of fitness for participation in political life—a fitness which the illiterate man does not possess. But as Lord Bryce very properly pointed out, this assumption is of doubtful validity. Every one, he said, knows or has known intelligent workingmen, farmers, peasants who for one reason or another never learned to read or write—white men of this type were numerous in the southern states during the period following the Civil War and were not lacking in England—but who nevertheless had "plenty of mother wit, and by their strong sense and solid judgment were quite as well qualified to vote as are their grandchildren to-day who read a newspaper and revel in the cinema."<sup>67</sup> Moreover, as Lord Bryce pertinently added, the printed page, the ability to read which is regarded as a test of capacity to vote, may contain as much falsehood as truth—especially if it be a party organ which suppresses some facts and misrepresents others—and he who derives his information regarding political issues from it may be no better off than his grandfather who eighty years ago voted at the bidding of his landlord or his employer. Finally, high intellectual

<sup>67</sup> "Modern Democracies," vol. I, pp. 73-74. Compare, in the same sense, Barthélémy, "Le problème de la compétence dans la démocratie," p. 41.

attainments in science or other fields of knowledge is no guarantee against crass ignorance in respect to public affairs, and every one has known voters with college educations who were less informed upon such matters than their uneducated neighbors who were artisans and workingmen.

Nevertheless, when all is said that can be said against the literacy test as evidence in itself of fitness for voting, it does not indicate that an educational requirement for the suffrage is unsound in principle. It only asserts that mere ability to read and write does not necessarily equip one with the information which one ought to have, and must have, to decide wisely questions of public policy submitted to him for his opinion. An educational test, like the principle of weighted voting, is perfectly sound in principle; the difficulty lies in the lack of a just and practical criterion by which it can be applied.

**Property-Owning and Tax-Paying Tests.**—The property-owning or tax-paying requirement is, to many persons, open to the same objections. On the one hand, the state may be regarded as a sort of stockholding company in which only those who possess property can properly be considered shareholders; or as an agency for the protection of those only who contribute by the taxes which they pay for its maintenance. But to proceed on such a theory would, as in the case of the educational test, lead to manifest injustice in many cases. The ownership of property gained by toil, industry, and thrift may very properly be regarded as evidence of the fitness of the owner for a share in the government which determines the conditions under which he may acquire, use, and dispose of property, and which exacts contributions of him on the basis of its value, but can the owner of property not acquired in this way lay claim to the same right? It is just to disfranchise and disqualify from office holding the otherwise worthy citizen who in consequence of adversity and misfortune finds himself without property? It may be seriously doubted. The tax-paying test has more to commend it. It is entirely conceivable that it would be a hardship in specific cases to insist upon the ownership of property as a condition of voting when it would not be so to require the payment of a small tax in part return for the protection which, as a member of the state, the voter receives. In short, the ownership of property and the payment of contributions for the maintenance of the state stand on different footings and are not interdependent.

## V. FACTORS WHICH DETERMINE THE VALUE OF THE ELECTORAL PRIVILEGE

**First, the Number of Elective Officers.**—Manifestly the value of the suffrage and the power which its possessor is capable of wielding through its exercise depend upon several conditions. In the first place, it necessarily varies in proportion to the number of elective officers and the extent to which the principle of the popular referendum in legislation and upon public policies exists in the state. Clearly, universal suffrage would amount to nothing in a state where there were no elective offices and where the referendum did not exist in any form. On the continent of Europe, generally, few executive, administrative, or judicial offices are filled by popular election. In France, to take a conspicuous example, where a system of virtual universal manhood suffrage prevails, no executive offices from the presidency of the republic down to the mayor of a village, and no judges of the courts (with the exception of the members of the councils of *prud'hommes* and the tribunals of commerce) are elected. There, only members of parliament and of the departmental and other local councils are elected by popular vote, and the referendum, as it exists in the United States, is unknown in practice. Obviously the rôle of universal suffrage under such conditions is a very restricted one. On the other hand, in the states of the American Union where the elective principle extends to a large number of executive and even administrative offices, where in most states even the judges of the courts are popularly elected, where candidates are nominated by popular vote, and where the referendum is resorted to on a wide scale for the purposes of ordinary legislation, the ratification of new constitutions and constitutional amendments, and for the decision of various questions of public policy, where official tenures are short and consequently elections frequent, the rôle of the elector is—potentially at least—much more important than in Europe and, as pointed out above, his burden and responsibility are correspondingly heavier—so heavy indeed that intelligent voting has become increasingly difficult.

**Second, Direct and Indirect Elections.**—In the second place, the influence and rôle of the elector vary with the directness or indirectness with which the electoral function is exercised. In various countries of Europe when large extensions of the suffrage

were made, a system of indirect and double election was introduced at the same time, as a means of counteracting or attenuating the possible evils of a democratic suffrage. Reference has already been made to the old Prussian system of indirect election for the members of the lower chamber. In a number of the other German states a system of indirect election prevailed until recently, for example in Bavaria until 1906. In France senators are still chosen by a process of indirect election. Norway, prior to 1905, had a system of indirect voting for the election of members of the Storthing, and in Sweden such a system still prevails for the election of members of the upper chamber. In Denmark 54 of the 66 members of the Landsting are indirectly chosen by local electoral colleges. As is well known, the Soviet Government of Russia is based on a system of indirect elections. The peasant and artisan voters elect village soviets; these elect representatives to the *bolost* soviet, which chooses representatives to the All Russian Congress at Moscow; and this latter assembly elects the executive committee which is the principal governing authority of the country. All the other constitutions put into effect since the World War specifically declare that elections of members of the lower chamber (and also the upper chamber where it is popularly elected) shall be *direct*.

**Arguments for the Method of Indirect Election.**—The principal argument in favor of the system of indirect election is that it eliminates to some extent, as has been said, the possible dangers of universal suffrage by confining the ultimate choice to a body of select persons possessing a higher average of ability and necessarily feeling a keener sense of responsibility. Moreover, it tends to diminish the evils of party passion and struggle by removing the object of the popular choice one degree and confining the function of the electorate as a whole to the choice of those upon whom the ultimate responsibility must rest. "This contrivance," said John Stuart Mill, "was probably intended as a slight impediment to the full sweep of popular feeling; giving the suffrage and with it the complete ultimate power to the many, but compelling them to exercise it through the agency of a comparatively few who, it was supposed, would be less moved than the Demos by the gust of popular passion, as the electors, being already a select body, might be expected to exceed in intellect and character the common level of their constituents, the choice made by them was thought likely

to be more careful and enlightened and would in any case be made under the greater feeling of responsibility than election by the masses themselves."<sup>68</sup> But experience with the indirect system of election has never worked out in practice satisfactorily. In France it failed to meet the expectations of its authors and was abandoned for the system of direct election, except for the choice of senators; and this has been the experience of most states where it has been tried.<sup>69</sup>

**Objections to Indirect Election.**—Where the party system is well developed, the indirect scheme is likely to degenerate into a cumbrous formality, since the intermediate electors will be chosen under party pledges to vote for particular candidates. This has been the history of the indirect system for choosing the President and Vice President of the United States, where the presidential electors have become mere party puppets, without judgment or freedom of action in performing the high functions that were intended to be exercised by them.<sup>70</sup> Wherever the intermediate electors are reduced to the position of party puppets, they are certain to be persons of less weight, as Lord Brougham observed, because their office is only occasional and temporary and hence their sense of responsibility is weakened.<sup>71</sup> "It may be safely asserted", said Francis Lieber, "that the Anglican people are distinctly in favor of simple elections." "Elections by middlemen deprive the representation of its directness in responsibility and temper: the first electors lose their interest, because they do not know what their action may end in; no distinct candidates can be before the constituents and be canvassed by them, and inasmuch as the number of

<sup>68</sup> "Representative Government," ch. 9, p. 180. "Election in two stages has certainly *a prima facie* tendency to improve the quality of the legislature," says Sidgwick, "if it does not become a formality, and if both parts of the process are performed with independence and honesty of purpose; since the competence of the elected electors may be expected to be on the average greater than that of the citizens who elect them, and their sense of responsibility stronger." "Elements of Politics," p. 403.

For a defense of the indirect system, see Laveleye, "Le gouvernement dans la démocratie," vol. II, bk. IX, ch. 6. Laveleye argued that the system would secure representatives of higher character and ability because the choice would be made after discussion and reflection on the part of the electors.

<sup>69</sup> Compare Duguit, "Manuel de droit constitutionnel," pp. 350-351.

<sup>70</sup> See as to this point Dougherty, "The Electoral System of the United States," ch. 10.

<sup>71</sup> "The British Constitution," p. 70.

electors is a small one, intrigue is made easy."<sup>72</sup> Manifestly, whatever may be the advantages of indirect election, a suffrage which limits the power of the voter merely to the selection of those who are to choose instead of those who are to represent him will not satisfy the masses in the present state of the world's opinion concerning the nature of representative government.<sup>73</sup> The idea is out of harmony with the spirit of modern democracy. One of the chief merits of popular government comes from the fact that it stimulates interest in public affairs and increases the political intelligence of the masses. If a middleman is interposed between the voter and the object of his choice, his interest is necessarily diminished and his opportunity for political education weakened.<sup>74</sup> If a person is fit to choose an elector, said Lord Brougham, he is fit to choose a representative. He may, of course, be unfit to vote wisely upon a measure or a question of public policy and still be fit to choose some one to act for him in such matters. Finally, the indirect system tends to increase the evils of bribery, because the ultimate electoral body is much less numerous and consequently more easily reached by corrupt influences than the whole mass of voters.

**Public Versus Secret Voting.**—Again, the value and effectiveness of the electoral privilege depend to some extent upon the manner in which the formality of voting is exercised. Opinion and practice are now universal that if the privilege is to be exercised freely and independently, guarantees must be provided under which the choice or decision of the voter can be expressed in secret. Formerly, however, the practice of oral or public voting had its defenders and in practice it was the general rule. Montesquieu defended it on the ground that it afforded a means by which the common people could be assisted and instructed by the more enlightened.<sup>75</sup> John Stuart Mill defended it on the ground that "the duty of voting, like any other public duty, should be performed under the eye and criticism of the

<sup>72</sup> "Civil Liberty and Self-government," p. 174. See also Story, "Commentaries," vol. I, sec. 576.

<sup>73</sup> "I believe," says Lieber, "that neither Americans nor Englishmen would think the franchise worth having were double elections introduced." "Civil Liberty and Self-government," p. 174.

<sup>74</sup> See as to this point Bluntschli, "Politik," p. 455; also his "Allgemeines Staatsrecht," p. 69. For a criticism of the indirect system by a French scholar, see Benoist, "Crise de l'état moderne," pp. 82-98.

<sup>75</sup> "Esprit des lois," bk. I, ch. 2.

public"—a duty in the proper performance of which every one has an interest and a right to consider himself wronged when it is not so performed.<sup>76</sup> More recently the secret ballot was characterized by Professor Treitschke as "the shabbiest trick that was ever proposed in the name of liberalism." It was, he said, "unreasonable and immoral; voting is a public responsibility and its exercise should be public; no man can have a true sense of political honor who does not feel humiliated when he slinks up to the ballot box and slips his paper in!"<sup>77</sup>

From the first, however, there were men like Harrington<sup>78</sup> who defended secret voting as an essential condition to a free and independent suffrage. But until 1920, the system of public voting prevailed in Prussia; until 1909 in Saxony; until 1888 in Bavaria, and until 1901 in Denmark. Apparently Hungary (except the city of Budapest and the cities which enjoy municipal home rule) and Soviet Russia are the only countries left in which public oral voting is required or permitted.<sup>79</sup> In Prussia, especially, the results were deplorable. The government took advantage of the opportunity which it afforded to exert pressure upon the electors to vote for government candidates, and land holders and employers did likewise in respect to those who were mere or less subject to their control. The result was, large numbers of voters, rather than be exposed to intimidation of this kind or to loss of their positions through having their votes known to the public, abstained from voting. In the elections of 1903, while 75 per cent of the registered electors of Prussia voted for the election of members of the Reichstag, for which the system of envelope, and therefore, secret, voting prevailed, only 23.6 per cent voted for members of the Prussian Landtag under the system of public voting.<sup>80</sup> Nevertheless, the system was defended by Bethmann-Hollweg in a speech on February 10, 1910, before the Landtag, in which he said: "We are

<sup>76</sup> "Representative Government," ch. 10.

<sup>77</sup> "Politics" (Eng. Trans.), vol. II, p. 198.

<sup>78</sup> "Oceana" (Morley's ed.), p. 104.

<sup>79</sup> When the Hungarian electoral law of 1925, which provides for oral voting, was under discussion, Count Andrassy made a strong plea for the introduction of the secret ballot. Graham, "Reconstruction of the Hungarian Parliament," *Amer. Pol. Sci. Rev.*, vol. XX, p. 387.

<sup>80</sup> Gerlach, "L'histoire du droit électoral prussien," p. 222; Brocard, "La réforme électorale en Prusse," *Rev. Pol. et Parl.*, Feb. 1912, p. 289; and Barthélémy, "Les institutions politiques de l'Allemagne contemporaine," p. 72.

against secret suffrage because, in the place of developing in the elector the sentiment of responsibility, it attenuates it; while on the other hand it favors terrorism on the part of Socialists against the bourgeois electors".<sup>81</sup>

**The French Method of Voting Prior to 1914.**—In France, strictly secret voting did not exist before 1914. Ballots were provided by the candidates themselves, rather than by the state, and were distributed among the electors in advance of the election, and while the law required the ballots to be printed on white paper and without any external marks or signs by which they could be identified, there was no restriction as to their size or shape. Naturally each candidate took advantage of the opportunity which the absence of the latter requirement afforded, to provide himself with a ballot of such size or shape as to enable him to identify his own when it was being cast by the voter. The polling room was open to the general public and there was no provision for screened voting booths as in the United States or for concealing the ballot in an envelope as was the method employed in Belgium and for the Reichstag elections in Germany. Under these conditions it was fairly easy for candidates or their representatives, for employers, or for government watchers to determine for whom the ballots were intended when they were handed to the election officers by whom they were placed in the urn in full view of the assembled spectators. After a long controversy between the Chamber and the Senate over the reform of this method of voting, a law was finally passed in July, 1914, providing for a system of envelope voting, of ballots furnished by the state, which are obtainable by the voter only when he enters the voting hall the which are required to be placed in the envelope in a screened voting booth (*cabine d'isolement*). The law was passed in the face of considerable objection, especially against the provision for voting booths, which it was said would be *cabines de réflexion* and would, besides, entail large expense. The Senate refused to accept a provision permitting candidates to have watchers at the polls for the purpose of challenging the right of electors who were believed to be disqualified.<sup>82</sup>

<sup>81</sup> Quoted by Barthélémy, *op. cit.*, p. 71.

<sup>82</sup> As to the conditions of voting prior to 1914 and the details of the new law see my article, "Electoral Reform in France," *Amer. Pol. Sci. Rev.*, vol. VII (1913), pp. 631 ff., and the literature there cited.

**Facilities for Voting.**—Finally, it may be observed that the value of the electoral franchise depends in some measure upon the opportunities which are provided for its convenient exercise by the mass of the electorate, especially the working classes. Before the World War it was one of the outstanding grievances of the Social Democrats in Germany that the elections were not held on Sundays when workingmen and government employees were free to go to the polls. There were no laws such as are common in the United States which allow such persons to absent themselves from their work or offices on election day for the period of time necessary to cast their ballots, without deduction of their wages or salaries. Under the circumstances large number of voters were prevented from exercising in fact a privilege which the law conferred upon them. The German government, controlled as it was by those who desired to keep down the Socialist vote, refused to permit the elections to be held on Sundays. The new German constitutions, however, expressly provide that the elections shall be held on Sunday, and this practice is general throughout Europe.

Naturally, the smaller the voting district and hence the shorter the distance which must be traveled by the elector to reach the voting place, the fewer is likely to be the number of voters who will be deterred by considerations of convenience. As pointed out above, one explanation of the large number of abstentions from voting in Belgium prior to 1893 was the necessity which the voters were under of journeying to the capital town of the arrondissement in order to vote.

One further recent reform which has had the effect of increasing the value of the electoral franchise is the provision now common in the United States by which electors who are absent from home on election day may forward their ballot by mail and have the result recorded the same as if it were cast personally by the elector at his voting place.<sup>83</sup> A similar provision is contained in the British Representation of the Peoples Act of 1918, but the practice does not appear

<sup>83</sup> As to this legislation see the summaries in the *Amer. Pol. Sci. Rev.*, from 1914 to 1924 (vols. X-XVIII), by Professor Ray. In the summary of May, 1924, p. 321, it was said that all the states except four have absent-voting laws of one kind or another.

to have yet been introduced on the Continent.<sup>81</sup> Under the conditions of modern life the facility for voting thus provided serves to prevent the disfranchisement of large numbers whose occupation, business, health, or pleasure require them to be absent from their voting districts on election day.

<sup>81</sup> In 1923 the legislature of Ontario passed an act which enables railway employees and commercial travelers who expect to be absent from home on the date of a municipal election to cast their votes at a special polling at the city hall on any one of the three days preceding the election.

## CHAPTER XX

### THE LEGISLATIVE ORGAN

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#### I. DISTRIBUTION OF THE POWERS OF GOVERNMENT

**The Two-Power Theory.**—Strictly speaking, the powers of government may be classified as: first, those which consist in the formulation and expression of the will of the state, and, second, those which have to do with the executive of the will thus expressed. The first power may be comprehended under the general term of legislation,

interpreted in the broad sense of embracing acts emanating from both the constituent and the legislative organs. According to this classification the administration of justice—what is usually called the judicial power—is merely a part, a dependency, or a phase of the executive power.<sup>1</sup>

Generally the advocates of the "duality" theory subdivide the activities which have to do with the execution of the state will into three classes: (1) those which are executive in the larger sense, or which are limited to the supervision and direction of the task of execution; (2) those which are administrative in character or which are concerned with the actual mechanical or technical work involved in carrying on the executive functions of government; and (3) those which are judicial, or which have to do with the interpretation and application of the law to concrete cases. Finally, it should be noted that while most French writers conceive the judicial power to be a particular phase or manifestation of the executive power, they nevertheless separate rigidly the function of administration, strictly speaking, from judicial administration, or the administration of justice, by taking away from the judiciary practically all power of control over the administrative authorities. In other words, the doctrine of the separation of powers, as Dicey remarks, has in the mind of a French statesman a meaning very different from that attributed to it by statesmen in England or the United States. In France it means not merely that the judges should be independent as understood in the United States,

<sup>1</sup>This classification finds many supporters among French jurists. "The mind," says Ducrecq ("Traité de droit administratif," vol. I, p. 76) "can conceive of but two powers (*pouvoirs*): that which makes the law and that which executes it; there is no place for a third power by the side of the other two." To the same effect see also Duguit, "La séparation des pouvoirs," pp. 73-77; Pradier-Podéró, "Précis de droit admin," ch. 1; Giron, "La séparation des pouvoirs," pp. 1-3, 135, 411. See also my article on "French Administrative Law," in the *Yale Law Journal*, vol. XXXIII (1924), pp. 597 ff., where various opinions are cited. Compare also Goodnow ("Politics and Administration," especially chs. 1 and 2), who supports the French theory of the duality of governmental powers. All the powers of the state, he says, have to do either with the expression of the will of the state or the execution of that will. Those activities which belong to the former class may be appropriately comprehended under the name "politics," while those belonging to the second category may be embraced under the term "administration." "Politics" and "administration," therefore, include all the activities of the state, whether we describe them as legislative, executive, judicial, administrative, or otherwise.

but that the government and its agents ought to be independent of and free from, the jurisdiction of the ordinary courts.<sup>2</sup>

**The "Trinity" Theory.**—While the "duality" theory is accepted by most French writers, there are a few of high standing who reject it as unsound. Esmein, for example, asserts that the function of the judges in the application of the law is not simply an incident of execution and hence is not subordinate to the executive power. It is true, he admits, that the function of interpretation by the judiciary is preliminary to that of execution; that is, the judges determine in the first instance whether the law is applicable, in a particular case; but that does not make it a part of the act of execution. If the judicial power is only an incident of the executive power, then the judges are nothing more than the agents of executive and render justice in its name. Moreover, since the exercise of judicial power in many cases has no bearing whatever on the execution of the law, how can it be a part or phase of the executive power in such cases?<sup>3</sup>

While strict legal logic is in favor of the duality view, the vast majority of writers approve the traditional theory, which classifies the powers of government as legislative, executive, and judicial.<sup>4</sup>

**Other Classifications.**—Some recent writers, however, have found fault with this classification on the ground that it does not take into account certain powers of government included in the three groups mentioned but which deserve to be placed in separate categories of their own. Thus one writer proposes five classes: deliberative, legislative, executive, administrative, and judicial.<sup>5</sup>

<sup>2</sup> "Law of the Constitution," p. 181. See also, as to this, my article on "French Administrative Law," *Yale Law Journal*, vol. XXXIII (1924), pp. 597 ff.

<sup>3</sup> "Droit constitutionnel," pp. 337-351.

<sup>4</sup> Carré de Malberg, in his monumental treatise, "Théorie générale de l'état" (1922), vol. II, chs. 1-3, adopts a slight variation from the traditional classification. He classifies the functions of the state as legislative, administrative, and judicial (*juridictionnelle*). He admits, however, that the judicial function "is not in itself a function irreducibly distinct from the administrative function but is rather a part of the administrative function, submitted to a special régime and special forms." But he concludes that this does not prove that the judiciary is not a third power of the state. On the contrary it must be recognised as such. See pp. 810-811.

<sup>5</sup> Dealey, "The Development of the State" (1909), p. 144, and the somewhat similar classification of Gettell. "Problems of Political Evolution," p. 248.

Another adds the electorate and administrative powers to the legislative, executive, and judicial.<sup>6</sup> In countries like the United States, he says, where popular government has made the greatest advance and where the initiative and referendum have come to play a large rôle in the determination of public policies, the electorate has become "a distinct branch of government" and may be looked upon as "an integral part of the machinery of government or as standing outside of the government strictly speaking."<sup>7</sup> The administrative power, he points out, as French writers have often done, is different in its character from the executive power and falls therefore, in any practical classification, in a class by itself. It is different in that it has to do mainly with the actual carrying out of orders, whereas the executive power involves the making of decisions, sometimes the determination of policies, and embraces the functions of direction, supervision, and control.<sup>8</sup> The distinction is a proper one but since the administrative power and the executive power are entrusted to the same organ or department of government most writers will probably continue to treat them as one and inseparable.

**Supremacy of the Legislative Power.**—Of the several organs through which the will of the state is expressed and carried out, the legislature unquestionably occupies the paramount place. In states which have the unitary system of government it is the organ which determines how the powers of government shall be distributed territorially, that is, the degree to which the government shall be

<sup>6</sup> Willoughby, "The Government of Modern States," p. 229.

<sup>7</sup> The Italian writer Brunialti likewise treats the electoral power along with the legislative, executive, and judicial as one of the powers of government. To this he adds public opinion. "Il Diritto Costituzionale," vol. I, p. 314, quoted by Fairlie in his article, "The Separation of Powers," *Mich. Law Review*, vol. XVI (1923), p. 31. Carré de Malberg (*op. cit.*, vol. II, ch. 3) treats the electorate as a distinct organ of government and apparently also Barthélémy ("Le pouvoir électif dans les républiques modernes," p. 26).

<sup>8</sup> To make room for more important matter, it seems desirable to omit from this book the discussion of the theories of the separation of powers to which I devoted a chapter (ch. 13) in my earlier work, "Introduction to Political Science." The early theory that the strict separation of the legislative and executive branches was essential to the preservation of liberty is now largely discredited, and the organization of the great majority of governments to-day is not in fact in accord with the theory. The literature dealing with the subject is very extensive. The views of the more important writers are summarized by Professor John A. Fairlie in his excellent article cited above.

centralized or decentralized.<sup>9</sup> In states like France whose constitutions contain little detail in regard to the organization of the government, it is the legislature which determines its organization, how its powers shall be distributed, the relations between the organs created, etc. In all states it exercises a large control over the constitution and activities of the other organs, through its power over the sources of supply and its power to create public offices and to establish new services. Thus the legislature is in a sense the regulator of the administration.<sup>10</sup> The will of the lawmaking power must from the very necessity of the case be superior, to a certain extent, to those of the executive and judicial organs, first because that will must be expressed before it can be interpreted and enforced and, second, because it belongs to the legislature to provide the subordinate agencies and authorities through which the law is interpreted, applied, and executed. As was pointed out in a previous chapter, the dominant rôle assumed by the French parliament as over against the executive organ has tended to destroy the equilibrium which is an essential condition to the successful operation of the cabinet system, and has in consequence seriously impaired the French system of cabinet government.

In some countries, of which England is the most conspicuous example, where the constituent power and the legislative power are consolidated, the legislature plays a double rôle: it makes and alters the constitution and at the same time serves as the organ for ordinary legislation.<sup>11</sup> In unitary states it also plays the dual rôle of both national and local lawmaking body.

**Non-Lawmaking Functions of the Legislature.**—In most countries the legislature is not merely the lawmaking organ but at the same time it exercises a variety of other functions: electoral, judicial, directorial, and executive. Thus in many countries it has a share in the process of amending the constitution, through its power to pro-

<sup>9</sup> Compare Willoughby, "The Government of Modern States," p. 282.

<sup>10</sup> Compare Goodnow, "Comparative Administrative Law," vol. I, p. 31, and Bluntschli, *op. cit.*, bk. VII, ch. 7.

<sup>11</sup> It has been pointed out that the British parliament acts in four separate capacities: (1) as the local legislature for England and Scotland (and until recently Ireland); (2) as the general legislature for both countries; (3) as the final legislative authority for the dependencies; and (4) the supreme legislature for the Empire as a whole. See Macdonald, "The Federal Solution," *Contemporary Review*, vol. CXIV (1918), p. 134.

pose amendments, and, in the case of the American state legislatures, to ratify amendments proposed by Congress. In the United States, Congress serves as a canvassing board to determine the validity of electoral returns in the case of the election of the President and the Vice President, and many state legislatures are vested with the same function in the election of the governor. Under certain circumstances the lower chamber of Congress may be called upon to choose a President and the Senate to choose a Vice President. In France and most of the newly established republics in Europe it is the parliament which elects the President. In Switzerland the legislature is the electoral body for choosing not only the members of the executive council but also the judges, the chancellor, and even the general of the army. In Prussia, Bavaria, and Baden it elects the ministry, or at least the prime minister. In the United States the upper house serves as a kind of executive council to confirm appointments by the President and to advise and (negatively) control him in the exercise of the treaty-making power. One of the outstanding prerogatives of the old German Bundesrat was its extensive power to make ordinances and to perform various other acts of an administrative and judicial character. In countries where public officers are removable by impeachment one of the chambers serves as the court for the trial of the case and in some European countries, of which France is a conspicuous example, the upper chamber may be constituted as a high court of justice not only for the trial of the head of the state and the ministers for high crimes but also for the trial of offenses generally against the safety of the state. In many European states the quasi-judicial power of granting amnesties also belongs to the legislature.

The American Congress has also been described as an organ analogous to the board of directors of a corporation in that it determines how the government, and particularly the administrative branch, shall be organized, what services it shall undertake, how they shall be performed, and the amount of money which shall be expended for their maintenance.<sup>12</sup> Finally, the legislature is an organ for the expression of public opinion. Its members have, or are supposed to have, mandates from their constituents in regard to the important political issues of the day; to it petitions and memorials are addressed; and

<sup>12</sup> Willoughby, *op. cit.*, p. 301.

before its committees representatives of particular interests likely to be affected by legislation appear and are heard.

From this summary it is quite clear that the modern legislature is much more than a mere lawmaking organ, although its primary or normal function is still that of legislation.

## II. ORIGIN AND DEVELOPMENT OF THE LEGISLATIVE ORGAN

**Ancient Legislative Organs.**—Representative legislative assemblies as we know them to-day are of comparatively recent origin. Montesquieu observed that the ancients had no notion of a legislative assembly composed of representatives of the people.<sup>13</sup> In the states of antiquity the legislative power was not delegated to small select bodies of representatives but was exercised by kings or by the people themselves in primary assemblies. The historian Freeman, in speaking of the governments of ancient Greece, said that "the ancient world trampled on the very verge of representative government without actually crossing the boundary"; that the assembly which acted upon proposed laws and gave them their sanction was composed of the freemen themselves meeting in their personal capacity, and that representation in the adoption and passage of laws was unknown.<sup>14</sup>

**Origin of the Representative System; England.**—The beginnings of the modern representative system<sup>15</sup> are found in the folk-moots of the early Teutons of Germany. These were assemblies of the natural leaders of the tribe,<sup>16</sup> who determined the more important questions of common interest to the tribe. The Witenagemot of early English history was the assembly out of which in the course of time the first representative legislature known to history—the "mother of

<sup>13</sup> "Esprit des lois," bk. XI ch. 8.

<sup>14</sup> History of Federal Government," ch. 2.

<sup>15</sup> "The idea of representation," said Rousseau, "is modern: it comes to us from the feudal governments, from that iniquitous and absurd government under which the human race was degraded and where the name of man was a dishonor. In the ancient republics and even in monarchies the people never had representatives; the very word was unknown." "Contrat social," bk. III, ch. 15.

<sup>16</sup> This is the traditional view but it has found opponents. See the discussion on p. 317, *supra*.

parliaments"—was evolved. Not a representative body at first—at least not in the modern sense—it came in time, another name, to contain a certain number of members who possessed the true representative character. At first chosen probably by the sheriffs of the counties, they came eventually to be elected by the freeholders. Under Simon de Montfort in the thirteenth century representatives from the boroughs were added, and finally, by the end of the century, the assembly had come to possess all the elements which enter into the constitution of the British parliament to-day. The clerical element also was represented, so that the Parliament was indeed the assembly of the representatives of the three estates of the realm—the nobility, the commons, and the clergy. Early in the fourteenth century the division into two houses was effected, and the process of evolution was complete.<sup>17</sup>

**On the Continent.**—On the continent of Europe the development of representative institutions came later, was much slower of growth, proceeded with less continuity and upon somewhat different lines. In the government of some continental states of the Middle Ages the principle of representation played some part, but it was crude and imperfect. It was representation of the nobility, or of the trade guilds, or of other classes or organizations, rather than of the people. In the Cortes of Castile and of Aragon in the twelfth century we have a legislative assembly containing, among others, representatives of the cities. It was, in fact, the growth of cities during the Middle Ages that gave a powerful impetus to the development of the representative principle by the demand which they made for representation in the national assemblies. In France the beginnings of the representative system are found in the meeting of deputies of the three estates—the nobility, the clergy, and the townspeople—in a general parliament for the first time in 1392. At first summoned by the king for advice and information, the states-general soon established the principle that no taxes could be levied without their assent.<sup>18</sup>

<sup>17</sup> But in the Scotch parliament the representative, of the different estates sat together in one chamber.

<sup>18</sup> Bluntschli, "Allgemeines Staatsrecht," p. 44, and especially Esmein, "Cours élémentaire d'une histoire du droit," pp. 491 ff., and Carré de Mal'erg, *op. cit.*, vol. II, pp. 232 ff. On the development of the representative principle in Europe generally see Bluntschli, bk. II, ch. 1; also Jellinek, "Recht des mod. Staates," bk. III ch. 17.

Meetings of the states-general of France took place at irregular intervals for several hundred years, after which the practice of summoning them ceased until the Revolution. The Revolution abolished the system of representation by estates and established a system of national representation. In Germany, the system of representation by estates grew up in the thirteenth and fourteenth centuries along somewhat the same lines as in France.

**Characteristics of Early Representative Systems.**—It was characteristic of the system in the Middle Ages that it was representation of special classes or interests such as the nobility, the clergy, the townspeople, etc., rather than representation of the people as a whole. The organization of society in the Middle Ages, in fact, consisted largely of clearly differentiated social groups and classes, and it was a part of the political science of the time to allow each class distinct representation as such; and the idea survives to-day in the constitution of some second chambers, which represent to some extent the privileged or conservative elements in monarchical states. In the medieval system the church was also represented equally with the nobility, the cities, and the country. In practically all countries the church as such has lost its representation, though the idea still survives in the constitutions of a number of European states which allow certain high ecclesiastical functionaries seats as of right in the national parliament.

**The Medieval Deputy.**—For a long time the deputies of each estate were separately summoned and often sat in different chambers and voted separately. Thus it came about that in the place of single or double chambered assemblies there were sometimes three chambers and even four. The national parliament of Sweden, until 1806, consisted of four chambers, representing the nobility, the clergy, the bourgeois class, and the peasant class. Under the medieval system the deputy received a commission from his constituency; he often bore instructions as to how he should vote, and he was obliged to render an account of the manner in which he exercised his mandate, which unlike the mandate of a modern representative, was what the French call a *mandat impératif*. Usually he had only a specific power of attorney to remedy certain grievances and only rarely a general power

of legislation.<sup>19</sup> Nowhere outside of England<sup>20</sup> indeed, did the deputies chosen by the estates become representatives of the country at large with general powers of legislation.<sup>21</sup>

As Lord Brougham pointed out, the ancient and medieval representative was a delegate appointed to meet with other delegates to declare the will of the community, but not to consult for the good of the whole. He was like an ambassador sent to treat with ambassadors sent by other states. He was not a representative sent by one portion of the community to consult with the representatives of other portions of the same community and to agree upon the measures best adapted for securing the interests of the whole. On the contrary, he was an agent commissioned to watch over the separate, independent, and possibly conflicting interests of his principal. In no other sense had the delegate a truly representative character.<sup>22</sup>

<sup>19</sup> Compare Jellinek, "Recht des mod. Staates," pp. 556-558; Duguit, "L'état," vol. II, pp. 6 ff.; Bluntschli, "Allgemeines Staatsrecht," p. 50; Stubbs, "Constitutional History of England," vol. III, p. 421; Sidgwick, "Development of European Polity," ch. 21, especially p. 302. Edward Jenks in his "The State and the Nation" (1919), pp. 185, 193, maintains that the earliest political representatives were not agents or deputies charged with asserting the claims of their constituents but *hostages* seized by the royal authority from a reluctant community and held to ransom for the satisfaction of claims put forward by the royal authority.

<sup>20</sup> In the seventeenth century the idea that the deputy was a representative of the people rather than a delegate or *mandatarius* was generally asserted in England. Gardiner, "Const. Docs.," p. 279. Already during the reign of Elizabeth, Sir Thomas Smith in his remarkable book, "De Republica Anglorum" (1583), had asserted that every Englishman was represented in parliament and consequently was personally present by means of his representative.

Hallam, speaking of a debate in the English Parliament in 1571 on the proposed abolition of an old law requiring members to be resident burgesses, said: "This is a remarkable and perhaps the earliest assertion of an important constitutional principle that each member of the House of Commons is deputed to serve not only for his constituents, but for the whole kingdom: a principle which marks the distinction between a modern English Parliament and such deputations of the estates as were assembled in several Continental kingdoms: a principle to which the House of Commons is indebted for its weight and dignity, as well as its beneficial efficiency, and which none but the servile worshipers of the populace are ever found to gainsay." "Constitutional History," vol. I, p. 362.

<sup>21</sup> Lieber, "Civil Liberty and Self-government," p. 164.

<sup>22</sup> "The British Constitution," "Works," vol. XI, p. 70. "The estates of the Middle Ages," says Lieber, "consisted of deputies strictly instructed, limited, and fettered; sending for new instructions on each new question which might turn up; jealously, often hostilely, extorting from one another: granting and demanding, like separate sovereigns; little concerned about the advantage of the other

It was not until the end of the eighteenth century that the estates system on the continent of Europe gave way to a truly national system of representation; and, indeed, in some instances the old system survived until late in the nineteenth century.<sup>23</sup> The transformation was fairly complete in England by the middle of the sixteenth century, but it did not come in France until the Revolution, when the states-general declared themselves to be the representatives of the nation.

**Role of Early Legislatures.**—For a long time the legislature did not possess the plenitude of lawmaking power. Even in England until modern times it did little more than receive petitions, consider grievances, and make its wishes known to the crown, which was the legal repository of the legislative power. It expressed its views in the form of petitions addressed to the king, by whom, if they were granted, they were formulated in "statutes" which he promulgated. Later on the parliament adopted the practice of itself formulating the statute and of sending it to the king, not as a petition, but as an act, for his assent. Down until the Restoration the king in council, acting independently of parliament, exercised a large power of legislation under the form of ordinances. It was not until the Revolution of 1688 that parliament became in full measure the legislative organ of the country. A somewhat similar development took place on the Continent. Prior to 1918 it was the legal theory in Prussia that the king was the repository of the legislative power and that the rôle of the parliament was the negative one, of merely giving its assent to what the king willed in the form of law.<sup>24</sup> The legal theory, if not the fact, appears to be the same in Japan to-day.<sup>25</sup>

parties or general justice and universal fairness; treating as now a congress of universal plenipotentiaries, sent from various independent nations, would do but upon no broad or social and mutual principle." "Political Ethics," vol. II, p. 317. See also Bornhak, "Das ständische System," in his "Allgemeine Staatslehre," 2d ed., pt. III, sec. I. The medieval system of representation by estates, said Bluntschli, was not *Volkserstellung* but *Volksspaltung*. "Politik," p. 451.

<sup>23</sup> In the German kingdom of Württemberg, for example, traces of it lasted until the year 1907. Cf. De Lestrange, "Les monarchies de l'empire allemand," p. 167.

<sup>24</sup> Schulze, "Preussisches Staatsrecht," vol. II, pp. 21 ff., and Laband, "Staatsrecht des deutschen Reiches," vol. I, p. 517.

<sup>25</sup> Compare Willoughby, "Fundamental Concepts," p. 103. By Article 5 of the constitution, the emperor "exercises the legislative power with the consent of the imperial diet."

### III. CONSTITUTION OF THE LEGISLATIVE ORGAN

**The Unicameral Principle.**—For a long time it was regarded almost as an axiom in political science that legislative bodies—especially national legislatures—should be constituted of two chambers, and in practice the great majority of them are so constituted to-day. This principle, said Bryce, is the *quod semper*, the *quod ubique*, the *quod omnibus* of American constitutional doctrine.<sup>26</sup> Sir Henry Maine expressed the opinion that almost any kind of second chamber is better than none; what ought to be expected of it, he said, is not a "rival infallibility but an additional security." Bagehot thought that with an ideal lower chamber "perfectly representing the nation, always moderate, never passionate, abounding in men of leisure, never omitting the slow and steady forms necessary to good consideration" an upper chamber would not be necessary, but that it would be "extremely useful" as a "revising and leisured legislature."

In the eighteenth and early part of the nineteenth century single-chambered (unicameral) assemblies were looked upon with more favor. In America the unicameral system had an influential advocate in Benjamin Franklin, who is said to have compared a double-chambered legislative assembly to a cart with a horse hitched to each end, both pulling in opposite directions. Largely through his influence the legislature of Pennsylvania under its first constitution was constructed on the unicameral principle, and we have the testimony of John Adams that the question of whether the early American legislatures generally should consist of one or two chambers was one of transcendent importance at the time of the adoption of the first state constitutions.<sup>27</sup> In England, at the same time, a unicameral parliament was advocated by Bentham.

In France, at the time of the Revolution, the unicameral idea had many supporters, and the principle was incorporated in the constitution of 1791 by an almost unanimous vote of the National Assembly, and was continued in the constitution of 1793.<sup>28</sup> The constitution of the year

<sup>26</sup> "The American Commonwealth" (1910), vol. I, p. 485; compare also Esvein, "Droit constitutionnel," 3d. ed., p. 72; Laveleye, "Le gouvernement dans la démocratie," vol. II, p. 7; Story, "Commentaries," vol. I, sec. 548.

<sup>27</sup> See his essay entitled, "A Defense of the American Constitution."

<sup>28</sup> For a summary of the views of the Advocates and opponents of the single-chamber system in the French Constituent Assembly of 1789, see St. Girons, "La séparation des pouvoirs," pp. 175 ff.

III (1795), however, established the bicameral system ; and it was continued until 1848, when the single-chamber system was again reverted to, though only for a brief interval. Among the powerful advocates of the unicameral principle in 1848 was Lamartine, as Turgot had been its ablest defender at the time of the Revolution. The experience of France with single-chamber legislative assemblies, however, was not satisfactory ; and their proceedings, it is said, "were marked by violence, instability, and excesses of the worst kind."<sup>29</sup> With very few exceptions the states which have experimented with the single-chamber system have abandoned it for the bicameral system. In England, during the Commonwealth, it was tried for a brief period, but without satisfaction ; and the House of Lords, which had been abolished, was soon restored. The lack of a second chamber in the national Congress was one of the causes of dissatisfaction with the Articles of Confederation in the United States, and, with the exception of Benjamin Franklin, none of the framers of the constitution favored retaining the unicameral system.<sup>30</sup> In Pennsylvania, where it existed for a time (until 1790),—as also in a few other states for a time,—we are told that it was marked by a "want of stability" and resulted in "extremely impulsive and variable

<sup>29</sup> Boissy d'Anglas, one of the French advocates of the bicameral system at the time of the Revolution, asserted in 1795 that many of the evils which Frenchmen had suffered since the beginning of the Revolution had been due to the violence and excesses of a single chambered legislative assembly. See also St. Cirom, "La séparation des pouvoirs," p. 178.

<sup>30</sup> Compare Hamilton, in *The Federalist*, Nos. 62 and 63. See also the editor's note to Ford's edition of *The Federalist*, No. 22, p. 142. "The Continental Congress," he remarks, "had illustrated the evils of a single legislative body. Frequently it had adopted resolutions only to repeal them the next day, and in several cases had reject'd, considered, and adopt'd, and again reject'd in the course of a week, the same motion ; the change being due to the arrival or departure of members, and to the lack of any check." See also Kent's "Commentaries," 12th ed., vol. I, p. 222, where it is said that "the instability and passion" which marked the proceedings of the single chamber assemblies of Pennsylvania and Georgia "were very visible at the time and the subject of much public animadversion." "No portion of the political history of mankind," remarked Kent, "is more full of instructive lessons on this subject, or contains more striking proof of the faction, instability, and misery of states under the dominion of a single unchecked assembly, than that of the Italian republics of the Middle Ages which arose in great numbers and with dazzling but transient splendor, in the interval between the fall of the western and of the eastern empire of the Romans. They were all alike ill constituted, with a single unbalanced assembly. They were alike miserable and all ended in similar disgrace."

legislation.<sup>31</sup> Other countries, notably Spain, Portugal, Naples, Mexico, Bolivia, Ecuador, and Peru, all abandoned it, after trial, for the double-chambered system. But the new Spanish constitution of 1931 provides for a single chamber.

**Argument in Favor of the Unicameral System.**—The chief argument advanced in favor of the unicameral system by French statesmen and political writers in 1789 and again in 1848 was that it secured "unity" instead of "duality" in the organization of the legislative branch of the government. Two or three chambers, it was argued, meant two or three sovereignties.<sup>32</sup> "The law," said Sieyès, "is the will of the people; the people cannot at the same time have two different wills on the same subject; therefore, the legislative body which represents the people ought to be essentially one. Where there are two chambers, discord and division will be inevitable and the will of the people will be paralyzed by inaction." "If a second chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous"—a dilemma, said Bryce, which recalls that attributed to the Khalif Omar when he permitted the destruction of the library at Alexandria: "If the books agree with the Koran, they are not needed; if they differ they ought to perish."<sup>33</sup> The same view was expressed by Lamartine, who maintained that the double chamber sacrificed the great principle of unity by dividing the sovereignty of the state.<sup>34</sup> A similar line of reasoning

<sup>31</sup> *The Federalist*, Ford's ed., p. 142, note 1. As to early American experience see Moran, "Rise and Development of the Bicameral System in America," *Johns-Hopkins University Studies*, vol. XIII, and Morey, *Ann. Amer. Acad. of Pol. and Soc. Sci.*, vol. IV, pp. 215 ff. More than half the original thirteen colonies began with unicameral legislative assemblies but before the end of the eighteenth century all had become bicameral in structure. Of the newer states Vermont alone adopted the unicameral system, which lasted until 1836.

<sup>32</sup> Duguit, "Manuel de droit constitutionnel," p. 344.

<sup>33</sup> "Modern Democracies," vol. II, p. 399. "As usually happens," says Bryce, "these dilemmas owe their point to the omission of other possibilities. A second chamber may do work involving neither agreement nor disagreement with the other house, and it may, where it agrees in aims, suggest other and better means of obtaining them. The Khalif's remark would begin to have force only if the Koran were in encyclopedia containing all a Moslem needs to know. Probably he thought it was."

<sup>34</sup> Cited by Lieber in his "Civil Liberty and Self-government," p. 199. Compare also Destutt de Tracy, who argued that "the legislative body ought to be a unit in order that it may legislate without struggling against itself." "Commentaire de l'esprit des lois," bk. XI, ch. 2. See also St. Cirons, "La séparation des pouvoirs," pp. 175-176. One manifest advantage of the single-chamber principle

was followed by Condorcet, Robespierre, and other leaders in France at the time of the Revolution. In America, likewise, the same kind of argument was advanced by Franklin and others against the bicameral theory. Legislation being merely the expression of the common will, the necessity of committing it to two separate assemblies, each having a veto upon the action of the other, was not apparent. "All the arguments," said Judge Story, "derived from the analogy between the movements of political bodies and the operations of physical nature, all the impulses of political parsimony, all the prejudices against a second coördinate legislative assembly stimulated by the exemplification of it in the British parliament, were against a division of the legislative power."<sup>35</sup> In short, a double-chambered legislature was an assembly divided against itself.

Notwithstanding all the objections raised against the bicameral system, it has, as stated above, become almost universal. "It accompanies the Anglican race," observed Francis Lieber, "like the common law, and everywhere it succeeds."<sup>36</sup> "Of all the forms of government that are possible among mankind," said Lecky, "I do not know any which is likely to be worse than the government of a single omnipotent democratic chamber. It is at least as susceptible as an individual despot to the temptations that grow out of the possession of an uncontrolled power, and it is likely to act with much less sense of responsibility and much less real deliberation."<sup>37</sup>

**Advantages Claimed for the Bicameral System.**—The advantages claimed for a second chamber may be summarized as follows : First, it serves as a check upon hasty, rash, and ill-considered

is that in countries where the cabinet system of government prevails ministerial responsibility can be more readily enforced. The existence of two chambers under such a system is confusing, and one of them must necessarily play a subordinate rôle, since it has worked out in practice that responsibility to two chambers cannot very well be enforced. Controversies in France, Belgium, and other countries over the question of the responsibility of the ministry to both chambers have by no means been lacking.

<sup>35</sup> "Commentaries," vol. I, sec. 548. Duguit denies that the principle of "duality" in the structure of the legislature necessarily means conflict and enfeeblement of the legislative power or retards needed political reforms, and he shows from the experience of France that assertions to the contrary are not supported by the facts. "Manuel de droit constitutionnel," p. 347.

<sup>36</sup> "Civil Liberty and Self-government," p. 197.

<sup>37</sup> "Democracy and Liberty," vol. I, p. 299.

legislation. Legislative assemblies are often subject to strong passions and excitement and are sometimes impatient, impetuous, and careless. The function of a second chamber is to restrain such tendencies and to compel careful consideration of legislative projects. It interposes delay between the introduction and final adoption of a measure and thus permits time for reflection and deliberation.<sup>38</sup> "One great object of the separation of the legislature into two houses acting separately and with coördinate powers," said Chancellor Kent, "is to destroy the evil effects of sudden and strong excitement and of precipitate measures springing from passion, caprice, prejudice, personal influence, and party intrigue, which have been found by sad experience to exercise a potent and dangerous sway in single assemblies."<sup>39</sup> It is clear, said Bluntschli, in explaining the advantages of the bicameral system, that four eyes see better than two, especially when a subject may be considered from different standpoints.<sup>40</sup>

In the second place, the bicameral principle not only serves to protect the legislatures against its own errors of haste and impulse, but it also affords a protection to the individual against the despotism of a single chamber. The existence of a second chamber is thus a guarantee of liberty as well as to some extent a safeguard against tyranny.<sup>41</sup> There is a natural propensity on the part of legislative bodies to accumulate power into their hands, to absorb the powers of the executive and the judiciary, in short, to draw into their grasp the whole government of the state. They have a constant tendency, said Judge Story, to overstep their proper boundaries, from passion, from ambition, from inadvertence, from the prevalence of faction, or from the overwhelming influence of private interests. Under such circumstances, he added, the effective barrier against oppression, whether accidental or intentional, is to "separate its operations, to balance

<sup>38</sup> Story, "Commentaries," vol. I, secs. 550-554.

<sup>39</sup> "Commentaries," vol. I, lect. XI. "There is certainly no proposition in politics," said Lecky, "more indubitable than that the attempt to govern a great heterogeneous empire simply by such an assembly must ultimately prove disastrous, and the necessity of a second chamber to exercise a controlling, modifying, retarding, and steadyng influence has acquired almost the position of an axiom." "Democracy and Liberty," vol. I, p. 300. See also St. Girons, "La séparation des pouvoirs," p. 185.

<sup>40</sup> "Allgemeines Staatsrecht," p. 6.

<sup>41</sup> Cf. St. Girons, *op. cit.*, p. 182. See also Laveleye, "Le gouvernement dans la démocratie," vol. II, p. 11, and Acton, "History of Freedom and Other Essays," p. 98.

interest against interest, ambition against ambition, the combination, and spirit of dominion of one body against the like combinations and spirit of another."<sup>42</sup> The existence of a second chamber, Story continued, doubles the security of the people by requiring the concurrence of two distinct bodies in any scheme of usurpation or perfidy where otherwise the ambition of a single body would be sufficient.<sup>43</sup> "The necessity of two chambers," said Bryce, "is based on the belief that the innate tendency of an assembly to become hateful, tyrannical, and corrupt, needs to be checked by the co-existence of another house of equal authority."<sup>44</sup>

A third advantage formerly claimed for the bicameral system is that it affords a convenient means of giving representation to special interests or classes in the state and particularly to the aristocratic portion of society, in order to counterbalance the undue preponderance of the popular element in one of the chambers, thus introducing into the legislature a conservative force to curb the radicalism of the popular chamber. We cannot, said Bluntschli, ignore the distinction between the aristocratic and democratic elements in the population of the state and allow one of these elements alone representation in the legislature without doing the other an injustice.<sup>45</sup>

<sup>42</sup> "Commentaries," vol. I, sec. 558. "The executive power in our government," said Jefferson, "is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most to be feared and will continue to be so for many years to come." Letter to Madison, March 15, 1789.

<sup>43</sup> *Ibid.*, sec. 700.

<sup>44</sup> Sidgwick remarked that passions are more likely to affect a single body than two, and that the danger of encroachments by the legislature on the functions of the executive is undoubtedly diminished by the existence of two legislative chambers. John Stuart Mill did not attach much importance to the value of a second chamber as a check upon precipitancy of legislation or as a means of compelling deliberation, and he expressed the opinion that the subject had received an amount of attention, especially on the continent of Europe, out of all proportion to its importance. "For my own part," he said, "I set little value of any check which a second chamber can apply to a democracy otherwise unchecked." Yet Mill admitted that a second chamber serves an important purpose as a check upon legislative despotism. A majority in a single assembly, he said, with no check but their own will, "easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority." "Representative Government," ch. 13.

<sup>45</sup> "Allgemeines Staatsrecht," pp. 63-64. Compare also Esmein, "Droit constitutionnel," pp. 100-101.

It also affords a means of giving separate representation to the somewhat dissimilar interests of capital and labor. An actual illustration of the value of this principle is found, we are told by a well-known writer, in the Australian state of Victoria, where the upper chamber of the legislature is made up mainly of the representatives of capital, while the other chamber is composed principally of the representatives of labor. This is the result chiefly of a restricted suffrage for the upper house, higher property qualifications for membership in it, and the non-payment of its members for their services.<sup>46</sup> But it was such a situation as this which led to the abolition of the upper chamber of Queensland in 1922.

Finally, the bicameral system affords an opportunity, in countries having the federal form of government, of giving representation to the units composing the federation. In order to maintain the proper equilibrium between the component members and the federation as a whole, the former ought to be represented in one chamber of the legislature without regard to population, that is, represented as distinct and equal political organizations. This, in fact, is the principle upon which the legislatures of most states having the federal form of government are at present constructed.

**Reaction against the Bicameral System.**—Notwithstanding the spread of the bicameral system there has been in recent years more and more of a disposition to recognize that some of the advantages claimed for it are not real and to maintain that, on the contrary, the advantages of a single-chamber assembly, under modern conditions, more than counterbalances the disadvantages. The bicameral principle, therefore, like the theory of the separation of powers, has lost much of the sacrosanct character which it once possessed in the popular mind and has been the object of increasing attack by political writers. Important movements have taken place in several American states (notably California, 1913, Oregon 1914, 1916, Nebraska, 1914) for the substitution of a single chamber in the place of the existing bicameral legislature.<sup>47</sup> Similar movements have taken place in other

<sup>46</sup> Edward Jenks, "Government of Victoria" (1891), p. 379.

<sup>47</sup> A majority of the California legislature in 1913 voted in favor of a constitutional amendment for this purpose but as a two-thirds majority was necessary the amendment was not submitted to the electorate. A somewhat similar proposal was made the object of a referendum in Oregon in 1914 and again in 1916.

countries, in some instances with success. Thus in the state of Queensland, Australia, in 1922 the upper chamber of the legislature was formally abolished;<sup>18</sup> when the South African Union was formed in 1909 the upper chambers of the local legislatures were all abolished and there was a strong sentiment in favor of establishing a unicameral parliament for the Union, but the force of tradition was too deep-rooted to be overcome.<sup>19</sup> Bulgaria, Costa Rica, Honduras, Salvador, Panama, all the Canadian provinces except two (Quebec and Nova Scotia), the cantons of Switzerland, many of the individual states of the German and Austrian federal republics, and most of the individual states of the Latin American federations, have unicameral legislatures. In a sense the parliament of Norway may also be regarded as unicameral, since the upper chamber is a body coopted from the assembly elected by the people. Several of the new states that have come into existence since the war—Finland, Latvia, and Estonia—have adopted the unicameral system. In 1931 Spain abolished the Senate. In this connection it may be observed that constituent assemblies or constitutional

A majority of those voting on the proposal in 1916 were in favor of it, but since it did not receive a majority of the total votes cast in the election it was defeated. In 1913 the governors of Arizona and Kansas in their messages to the legislature recommended the adoption of such an amendment. The governor of Kansas stated that he was satisfied after eight years' service in the legislature that a system of legislation by a two-chambered assembly was "antiquated and inefficient." Some details as to their proposals are contained in my address before the Illinois State Bar Association in 1907, *Proceedings*, pp. 378 ff. As to the fight in Oregon for the abolition of the Senate, see Barnett, *Amer. Pol. Sci. Rev.*, vol. IX (1915), p. 453.

<sup>18</sup> The upper chamber was appointed for life by the Crown; in practice appointments were made by the ministry in power. When the Labor party in 1915 carried the lower chamber and a Labor ministry came into power it found its policies opposed and defeated by what it considered a reactionary and irresponsible upper chamber. A movement for the abolition of the chamber was accordingly inaugurated which finally triumphed seven years later. See the details in the *Queensland Government Gazette* of Mar. 23, 1922.

<sup>19</sup> But the provision for two chambers was only temporary and the parliament was left free to abolish the upper chamber if it saw fit after 1920. See Smith, "A Nation in the Making," *Yale Review*, Feb. 1911. In 1911 Dr. F. J. Goodnow, constitutional adviser to the president of China, recommended the establishment of a parliament with a single chamber for the Chinese republic. He pointed out that China had no aristocracy and was not a federal union composed of states to which it would be desirable to accord separate representation; consequently there was no real reason for two chambers. Text of his memorandum in *Amer. Pol. Sci. Rev.*, Nov., 1911, pp. 541 ff.

conventions (as they are called in the United States) for framing and revising constitutions have universally been unicameral in structure and no one, apparently, has ever proposed another system.

**Recent Curtailment of the Powers of Upper Chambers.—**

Finally, and this is significant, there has been a marked disposition in recent years to curtail the powers of upper chambers in countries where they exist and to reduce them to the rôle of mere revising and delaying bodies. This movement began with the British Parliament Act of 1911, which virtually took away from the House of Lords its power to defeat bills passed by the House of Commons. In consequence of this Act the upper chamber retains only the power to oppose legislation proposed by the lower house and to delay its enactment, but the latter may override the Lords and make its own will prevail in the end. To a large extent therefore, it may be said that the British parliament is the House of Commons. Likewise many of the new Continental constitutions which have been framed since the World War provide that the lower chambers may by an extraordinary majority override the upper chamber and make their own will prevail in respect to legislation which they insist upon. Such provisions of one form or another are found in the new constitutions of Germany, Austria, Poland, and Czechoslovakia. These facts leave little doubt that the old idea of the necessity of two chambers with equality of legislative powers is losing ground.

**Results of Experience as the Test of Utility.—**The value of the unicameral system should be determined not on the basis of *a priori* considerations or time-honored theories but upon considerations of utility founded upon the results of actual experience. Where careful studies of the actual workings of the system have been made the results do not by any means support all the claims that have been put forward in favor of the utility of second chambers. Thus a study of the work of the New York legislature at its session of 1910 brought out the fact that the lower house rejected only six per cent of the bills passed by the upper house while the latter house rejected only fourteen per cent of the bills passed by the lower house. It was shown that a much larger number of bills were defeated by the executive veto than through the checking device of the bicameral system, from which the author concluded that "it can scarcely be claimed, therefore, that

the bicameral system provides an effective check on hasty, ill considered, and careless legislation."<sup>50</sup>

In 1914 a joint committee of the Nebraska legislature made a report in favor of a constitutional amendment providing for a legislature of a single house. Among other reasons why, in the opinion of the committee, the bicameral system was not a success, it stated that "in practice it has been found that the so-called 'check' between the two houses results in deadlocks and the absence of real responsibility which should be felt by representatives of the people."

"Nothing is more common," said the committee, "than for one house to pass a bill and for the members who voted for it to urge the other house to defeat it, and for a little group of members in one house to hold up legislation for the other house until they extort from it what they demand." "Deliberation and reflection," it added, "do not now mark the work of a two-house legislature, which passes most of its legislation in the last ten days of the session. A smaller body, with a more direct responsibility upon each member arising therefrom, will tend to greater deliberation and reflection than the present system."<sup>51</sup>

One of the common arguments in support of the bicameral system is that it increases the difficulty of getting measures through the legislature by means of bribery and corruption or measures which are objectionable upon their intrinsic merits and for which there is no popular demand or necessity. But those who rely upon this argument overlook the fact that the device works both ways, since it may serve to delay or prevent the enactment of good laws as well as bad ones. A committee of the People's Power League of Oregon, in an argument prepared in 1914 in support of a constitutional amendment to abolish the Senate in that state, asserted that the Senate had more often prevented the enactment of laws for which there was a popular demand

<sup>50</sup> Colvin, "The Bicameral System in the New York Legislature," p. 180. A somewhat similar conclusion was reached by Mr. Lynn Elaines in a study of the Minnesota legislature in 1911 and by Franklin Hitch'orn in his "Story of the California Legislature of 1913." See also the conclusions of Professor W. R. Sharp in his "Le problème de la seconde chambre et la démocratie moderne" (1922), pp. 75, 89, to the effect that America and Australian experience has failed to demonstrate the necessity of two elective chambers.

<sup>51</sup> Text of the report in bulletin No. 4, of the Nebraska Legislative Reference Bureau, 1914.

than it had defeated the enactment of bad laws. Whether the assertion was true or not may be questioned, but it may at least be said that the possibility exists where the bicameral system is found. The popular notion that large double-chamber legislatures insure greater safeguards against haste, corruption, and irresponsibility than do small single-chamber bodies may be seriously doubted; on the contrary, where the legislature consists of a small unicameral assembly each member's responsibility can be more definitely fixed and there can be no shifting of responsibility from one chamber to another. Experience with the bicameral system also shows that the operation of the legislative machine is frequently impeded and sometimes paralyzed by deadlocks between the two chambers, and it is hardly necessary to add that it is characterized by "logrolling" and trading between the two chambers.<sup>52</sup> The possibility of deadlocks is recognized by the constitutions of various states (for example Australia and the South African Union) and provision has been made by which they may be terminated.<sup>53</sup>

Another criticism of the bicameral system has been made, namely, the increased expense in the form of salaries of members and the hire of extra clerks and other employees.<sup>54</sup>

In considering the merits of the bicameral system one further element may be mentioned, namely that it was not adopted originally out of considerations of utility, efficiency, or protection against the despotism and tyranny of single chambers but was rather the result of historical conditions. Both in England and on the Continent second chambers grew into existence as the result of the existence in those countries of privileged aristocratic classes to which it was necessary to accord special representation in a separate chamber. But for this necessity it is by no means certain that second chambers would ever

<sup>52</sup> Professor Barthélemy, a member of the French chamber of deputies, in his excellent book "Le problème de la compétence dans la démocratie" (1918, p. 116), dwells upon the use which is made of the bicameral system in France for the *sabotage* of legislation. "Too often," he says, "the lower chamber adopts a measure of democratic outbidding while saying 'the Senate will kill it'; too often it passes a bill without consideration, saying 'the Senate will correct it.'"

<sup>53</sup> As to these provisions see Temperly, "Senates and Upper Chambers," pp. 59 ff., and Marriott, "Second Chambers," pp. 190 ff.

<sup>54</sup> In this connection it was claimed that the bicameral legislature of Oregon spent almost ten times as much money for clerical hire in 1907 as did the single-chamber legislature of British Columbia in 1908.

have been provided for. In the British colonies of America, Australia, and elsewhere the historical reasons which gave rise to the bicameral system in England never existed. To what extent its adoption in these latter countries was due to the unconscious force of imitation and to what extent it was due to deliberate creation and a conscious belief that it possessed distinct advantages over the unicameral system, cannot be determined. So far as the United States Senate is concerned—and to a certain extent this may be said of the upper chambers of federal unions generally—its creation was certainly the result quite as much of political necessity (the necessity as it was then understood of providing a separate chamber in which the individual states as such could be represented) as of any belief as to the inherent superiority of the bicameral system.<sup>55</sup> But it does not follow that because the establishment of the bicameral system is a necessary condition in the process of formation of federal unions or because it may possess certain intrinsic merits in such states, it is equally necessary and desirable in unitary states.

#### IV. UPPER CHAMBERS

**Constitution of Upper Chambers.**—It is not possible here to discuss in detail the constitution of upper chambers, even of the more important states. Upon examination it will be found that they may be grouped in the following classes:

First: Those which are constituted wholly or predominantly upon the hereditary principle. They include the British House of Lords, the

<sup>55</sup> Compare in this connection Marriott, "Second Chambers," p. 242. In 1911 Mr. J. M. Robertson, member of the British Parliament, in a chapter in a collection of essays published under the title "Second Chambers in Practice" (London, 1911), thus evaluated the bicameral system: "There are no valid theoretical arguments for second chambers, apart from the special cases of federations like the United States and Switzerland; and the theoretic argument against them has never been met. The supremacy of the second chamber in the Federal constitution of the United States is illogical, indefensible, and injurious. The argument from experience turns out to be invalid; second chambers are constant sources of friction where they are not mere instruments of delay, and delay can demonstrably be better provided for by another expedient. All forms of senate either frustrate the principle of representation or are superfluities."

An able partisan of the unicameral system is Professor Laski ("Grammar of Politics," p. 330 ff.), who thinks a single chamber "best answers the needs of the modern state." It is also advocated by Mr. Lees-Smith in his recent book, "Second Chambers in Theory and Practice."

former Hungarian Table of Magnates (prior to 1926), and the former upper chamber of Austria. Until recently there was a large hereditary element in the upper chambers of most of the German states, although it was not predominant.<sup>56</sup>

Second: Those which are composed wholly or in preponderating part of members appointed by the executive for life or a term of years, which in countries having the cabinet system means appointment by the ministry. In this group are the Italian Senate, the Japanese House of Peers, the Canadian Senate, the upper chambers of Quebec and Nova Scotia, certain Australian states, and until recently New Zealand.

Third: Those which are composed of members elected directly on the basis of the same suffrage as that upon which the lower chamber is elected. In this class are the Senate of the United States (since 1913), the senates of the several states composing the federal union, the senates of Brazil, Australia, New Zealand, Sweden, Chile and most of the other Latin-American states, Czechoslovakia, and Poland.<sup>57</sup>

Fourth: Those composed wholly or preponderantly of members chosen by *indirect* election based on popular suffrage. In this class are the upper chambers of France and Denmark.

Fifth: Those composed of members elected by the local legislatures or councils. They include the upper chambers of the Netherlands, Prussia, China, Portugal, Union of South Africa, and formerly the United States.

Several upper chambers combine two or more of these methods of selection. Thus the British House of Lords contains both hereditary and appointed members and so did a number of the Continental upper chambers prior to the World War. As stated above, the Japanese upper chamber is composed of hereditary, appointed, and elected members. The Danish upper chamber is composed of two classes of members: those chosen by indirect election and those appointed by the crown. Similarly the upper chamber of the South African Union is composed of eight senators appointed by the governor-general in

<sup>56</sup> There is a considerable hereditary element in the Japanese House of Peers, a large appointive element, and a number of members who are elected, though not by popular election.

<sup>57</sup> The members of the Irish senate will ultimately be chosen by popular election, but by electors who are at least 30 years of age whereas members of the lower chamber are chosen by electors 21 years of age and above.

council and eight senators elected from each of the four provinces by the provincial council thereof.<sup>58</sup> The Spanish upper chamber prior to 1931 contained three categories of members: indirectly elected members, hereditary members, and appointed members. The Belgian Senate since 1921 has consisted of three classes of members: popularly elected senators, senators chosen by the provincial councils, and senators chosen by the Senate itself (co-opted senators). The senate of Rumania is composed of two classes of senators: those who are elected and those who are senators of right *ex officio*. The upper chamber of Norway is unique in that it consists entirely of members co-opted from the lower chamber. The Swiss upper chamber also is peculiar: in the majority of cantons members of the upper chamber are chosen by direct popular election; in those which have *landesgemeinden* they are chosen by the popular assemblies, which amounts to the same thing; in seven cantons they are chosen by the cantonal legislatures.

**Merits of the Several Systems.**—It will be seen from this summary that the constitutions and modes of selection of upper chambers vary widely. It would be difficult to say which of these has the most (or the least) to commend it. As to those like the British House of Lords which are composed mainly of hereditary members the consensus of opinion now even in England is distinctly hostile. In fact, chambers constituted on this principle have disappeared everywhere in Europe except in Great Britain, and there the House of Lords has been deprived of real power, as we have seen. Appointed chambers, such as those of Italy,<sup>59</sup> Canada, and some of the Australian states, are objectionable for various reasons. The members being appointed by the ministry of the day, the appointments are made as rewards for party service, or for the purpose of "packing" the chamber in order to overcome opposition to ministerial policies, and in any case a chamber so constituted, owing no responsibility to the electorate, and

<sup>58</sup> This provision for the constitution of the upper chamber, as contained in the South African Act, was to be in force only ten years from the date of the taking effect of that act (May 31, 1910). After that date the South African parliament was authorized to provide how the senate should be constituted. As to the constitution of the upper chambers in the British dominions, see Keith, "Responsible Government in the Dominions," vol. I, ch. 7.

<sup>59</sup> In accordance with the reorganization measure of Mussolini, the Italian Senate is to become ultimately a body elected by the various economic, industrial, and labor organizations which are recognized by the Fascisti government.

uninfluenced by public opinion, is likely to be weak and distrusted by the public. Such a body is naturally undemocratic, especially when the members are appointed for life. For these reasons the late Professor Goldwin Smith pronounced the Canadian Senate to be "as nearly a cipher as it is possible for an assembly legally invested with large powers to be."<sup>60</sup> In recent years the demand for "reform" of the Senate has been widespread and to-day it is one of the paramount questions of Canadian politics. The only thing that can be said in favor of a chamber constituted on this principle is that it affords a means by which distinguished scholars and statesmen, who could not gain access to it through popular election, may become members.<sup>61</sup> If it is a gain to the state to have such men in the legislature the method of appointment may be commended for thus opening the door to them. Since appointed members usually serve for life or for long periods, it may also be argued that there is an advantage in having one chamber composed of men who are not influenced by the momentary changes of party politics and who by reason of their long tenures acquire a valuable experience which may be a distinct asset in the performance of the increasingly difficult tasks of legislation.<sup>62</sup>

**Popular Election of Upper Chambers.**—The method of direct popular election of the members of upper chambers in the same manner and by the same electorate as those by which the members of lower chambers are elected appears to represent the modern tendency. The chief argument for this method is that it is more in harmony with current notions of democracy and of popular responsibility. In fact the only upper chambers to-day which share anything like equality of actual power and influence with the lower chamber are those which are elected by the people either directly or indirectly.

<sup>60</sup> "Canada and the Canadian Question," p. 163. Compare also Porritt, "Evolution of the Dominion of Canada," p. 203, and Mackay, "The Unreformed Senate of Canada" (1927).

<sup>61</sup> It is through appointment that a large number of Italian scholars, scientists, literary men, and publicists have found their way into the Senate. As to the value of appointments as a source of membership in the legislature, see Sidgwick, *op. cit.*, p. 476.

<sup>62</sup> For this reason many Frenchmen regretted the constitutional amendment of 1884 which abolished the provision of the constitutional law of 1875 for 75 life senators. It is doubtful whether France has ever had since that date a Senate equal in ability and character to the Senate of 1876-1885. Compare Bracq, "France under the Republic," p. 8.

Those which are composed of hereditary or appointed members in all democratic countries play a distinctly subordinate rôle—the modest rôle of “revising” and of delaying bills passed by the lower chamber.

On the other hand, it may be argued and was so argued during the debates on the proposed amendment to the constitution of the United States providing for the popular election of senators, that this method of choice would lead to the general lowering of the character of the Senate, that it would result in the election of a larger number of demagogues and politicians in the place of eminent statesmen who are often poor vote-getters, and that it would even drive from the Senate a class of able men who would be disinclined to seek election under a system which required their active participation in long-drawn-out and expensive campaigns. That the change has had this effect, in some measure at least, there is abundant evidence. Another objection which may be made to a chamber chosen by the same electorate as that which chooses the lower chamber, especially if there is no great disparity between the duration of their tenures and the qualifications required for membership in it, is that in such a case much of the value of the bicameral system will be lost.

If the two chambers are identical in constitution, then the second is a mere duplication of the first. In that case you will have two rival chambers competing for leadership. Why then have two? Cannot the will of the people be effectively made known through one? “If the two houses were elected for the same period and by the same electors,” observed Lieber, “they would amount in practice to little more than two committees of the same house; we want two *bona fide* different houses representing the impulse as well as the continuity, the progress and the conservatism, the onward zeal and the retentive element, innovation and adhesion, which must ever form integral elements of all civilization. One house, therefore, ought to be large; the other comparatively small, and elected or appointed for a longer time.”<sup>63</sup> Some writers maintain that no advantage whatever is to be gained by the bicameral system if the two chambers are identical in constitution. In such a case it is, said Bluntschli, like employing duplicate organs to do the same thing. Bluntschli argued that the upper chamber ought to rest on a different basis from the lower chamber,

<sup>63</sup> “Civil Liberty and Self-government,” p. 198.

that it ought, to some extent at least, to represent special classes or interests or political units as such without full regard to population; while the lower chamber ought to represent the opinion and interests of the mass of population, and to this end the representatives ought to be chosen by the whole body of the citizens.<sup>64</sup> Judge Story was of the same opinion. The division of the legislature into two branches, he declared, would be of little or no intrinsic value unless the organization was such that each house could operate as a real check upon undue and rash legislation.<sup>65</sup>

**Indirect Election of Upper Chambers.**—It was to avoid the above-mentioned objections that some states have adopted the method of *indirect* election, the most important example of which is France, where the senators are chosen in each departmental circumscription by a college of electors who themselves (with the exception of the municipal delegates) have been chosen by direct popular election. There is little demand in France for the method of direct popular election of senators, such as led to the change in the United States, although there is considerable criticism that some of the electors are chosen not by popular vote but by the municipal councils, this for the same reason that the election of United States senators formerly by the state legislatures was criticized, namely, that it throws upon the municipal councils extraneous duties of a partisan character and injects into municipal elections issues relative to senatorial election.<sup>66</sup>

**Election of Local Legislatures.**—The method of election by local legislatures or councils is a favorite one, and in states having the federal system of government it has something to recommend it.

<sup>64</sup> "Allgemeines Staatsrecht," bk. 4, ch. 6. But Lord Bryce, referring to this argument, points out that those who advance it are stopped by the democratic dogma. If the second chamber is appointed, or chosen by a process of indirect election or by a restricted suffrage, or represents particular classes or interests, then the principle of modern democracy is violated. If, therefore, there is to be an upper chamber democracy requires that it shall be elected like the lower by popular suffrage. "Modern Democracies," vol. II, p. 405.

<sup>65</sup> "Commentaries," vol. I, sec. 69.

<sup>66</sup> See Duguit, "Droit const." vol. II, p. 246. There have, however, been some proposals for direct popular election of the Senate. Sharp, *op. cit.*, p. 97. In France as in the United States the Senate has often been criticized for its opposition to legislation demanded by public opinion and favored by the Chamber of Deputies. For instances, see Barthélémy, "Les résistances au Sénat," *Rev. de droit public*, 1913, pp. 371 ff., and Sharp, *op. cit.*, pp. 94-95.

It was the method by which United States senators were elected for 120 years, but it was abandoned in 1913 partly because of the inherent defects and difficulties of the method. So long as senators were chosen by the state legislatures there were frequent deadlocks between the two houses, cases of flagrant bribery were not lacking, the legislatures were often diverted from the discharge of their normal functions by long-drawn-out senatorial contests, and not infrequently the election of members of the legislature itself was determined not so much on the basis of their qualifications as representatives but with reference to their preferences for particular candidates for the United States Senate.<sup>67</sup>

**Proposals for Organization of Upper Chambers.**—The question as to the best mode of constituting an upper chamber is one of the most difficult in the whole field of political science, and it has frequently occupied the attention of political writers and of constitution makers. Professor Goldwin Smith is said to have remarked that it passed the wit of man to construct an effective upper chamber which would give general satisfaction. Even now there is no general agreement or uniformity of practice, although, as stated above, the tendency is to make the upper chamber a duplicate of the lower chamber so far as the source and manner of its election are concerned.

John Stuart Mill advocated a second chamber constructed on the principle of political experience and training, without reference to considerations of birth or wealth. If one chamber, he said, represents popular feeling, the other should represent personal merit, tested and guaranteed by actual public service and fortified by practical experience. If one is the people's chamber, the other should be a chamber of statesmen, a council composed of all living public men who have passed through important political offices or employments. Such a chamber, Mill argued, would be not merely a moderating body, or a simple check, but also an impelling force. It would be a body of natural leaders and would guide the people forward in the path of progress.<sup>68</sup> The best constitution of the second chamber, he declared, is that which

<sup>67</sup> As to these objections and the actual experience, see Haines, "The Election of Senators" (1906), chs. 7-8.

<sup>68</sup> "Representative Government," ch. 13. Mill suggested that such a chamber might include all who had had distinguished legislative experience, all who had held high judicial positions, all who had been members of the cabinet for at least two years, all who had held the highest positions in the army and navy, all who

embodies the greatest number of elements exempt from the class interests and prejudices of the majority, but having in themselves nothing offensive to democratic feeling.

**Proposal of the Bryce Conference.**—In 1918 a conference of which Lord Bryce was chairman, appointed to study and report upon the question of the reform of the British House of Lords, made an elaborate report in which it examined the various systems by which existing upper chambers are constituted and elected, and it recommended the recruitment of the British upper chamber by a combined process of derivation and coöptation under which a large majority of the members would be chosen by, though not from, the House of Commons, divided into geographical groups. The other members were to be selected by a joint committee of the two houses on the basis of the great interests from which the House of Lords originally sprang.<sup>69</sup> The report was not favorably received, no action has been taken upon its proposals, and the House of Lords still remains "unreformed."

**Lessons of Experience.**—Reason and experience would seem to suggest that if legislative bodies are to continue to be organized on the bicameral principle the two chambers should be constituted on different bases and principles.<sup>70</sup> The members of one

had held diplomatic positions of the first rank, and those who had been governors of colonies for a certain length of time. In short, membership in this chamber should, he said, be restricted to those who had attained legal, political, or military distinction.

<sup>69</sup> Text of Lord Bryce's letter to the prime minister accompanying and explaining the Report in McBain and Rogers, "The New Constitutions of Europe," pp. 573, and their comments, pp. 45 ff. The Bryce proposal is criticized by Sharp, *op. cit.*, pp. 116 ff., and by Lees Smith in his "Second Chambers in Theory and Practice," pp. 216 ff. The latter author advocates the Norwegian method of coöpting a second chamber from the membership of the lower chamber (pp. 249 ff.).

Mr. and Mrs. Sidney Webb, in their "Constitution for the Socialist Commonwealth of Great Britain" (pt. II, ch. 1), criticize the existing bicameral system, but, impressed by the overwhelming burden of modern legislative assemblies, they propose a division of its functions into two parts, one part to be confided to a "political" parliament, the other to a "social" parliament: in other words, they propose two parliaments between which the functions of legislation shall be divided. The scheme is criticized by Laski (*op. cit.*, p. 337) as "attractive" but "unworkable."

<sup>70</sup> Compare the conclusions of Professor Sharp in his "Problème de la seconde chambre" (pp. 75, 89, 129), that Australian and American experience

chamber ought to enjoy longer tenures, they ought to represent a larger constituency, higher membership qualifications ought to be required of them, and they might well be chosen in a different manner and by a differently constituted electorate.<sup>71</sup> But as stated above, modern democratic notions are not favorable to such chambers. Where these requirements exist there will always be one chamber smaller in size than the other, possessing a higher degree of experience and perhaps of ability, more conservatism of spirit, and representing more fully the higher property and intellectual interests of the state. Thus the high age qualification (the attainment of the fortieth year) required of senators in Belgium, France, Poland and Italy (the forty-fifth year in Czechoslovakia) has had the effect of securing more experienced statesmen in the legislatures of those countries. The longer tenure and the larger constituency of members of upper chambers generally have had something of the same effect.

**Distribution of Seats in Upper Chambers.**—As to the basis of representation in upper chambers two rules are followed in practice. In the first place, in most federal unions members are apportioned roughly among the provinces, departments, or states on the basis of population. This method is followed in France, Germany, Belgium, Canada, and other countries. In the United States, Brazil, and the Commonwealth of Australia the principle of equality of representation prevails. In the United States each state has two senators, in Brazil three, and in Australia six. In view of the vast inequality

shows the inutility of two chambers when one is, as to its mode of election, a mere duplicate of the other. Democratic logic, as he points out, requires that the upper chamber shall be elected upon a suffrage as broad as that of the lower chamber and consequently must possess equality of powers with the lower chamber. Yet if it is so elected, and so endowed with authority, its value as a moderating and restraining chamber will be in large measure gone.

<sup>71</sup> The Bryce Report recommended that the tenure of members of the proposed British upper chamber should be longer (12 years) than that of members of the House of Commons, and that its membership should not be renewed at once in its entirety but partially at stated intervals. It may be noted that the constitution of Ireland fixes the terms of senators at 12 years. More interesting still, it lays down that "the senate shall be composed of citizens who have done honor to the nation by reason of useful public service or who, because of special qualifications or attainments, represent important aspects of the nation's life" (Art. 29). But since senators are to be elected by the people it is not easy to see how this requirement can be enforced.

of population among the different states it is hard to defend the principle of equality of representation upon the theory of democracy. In the United States where the state of New York with a population of more than 12,500,000 has only two senators, whereas Nevada with a population of about 91,000 has two, the inequality is absurd and indefensible. On a proportional basis New York would be entitled to 275 senators. The five states of New York, Pennsylvania, Illinois, Ohio, and Texas have forty-two million inhabitants, or about 34 per cent of the total population of the country, yet in a Senate of ninety-six members they have but ten, that is, slightly more than 10 per cent of the total.<sup>72</sup>

**Powers of Upper Chambers.**—It has long been an almost universal practice to confer upon upper chambers certain special powers which lower chambers do not possess. Thus the House of Lords is the Supreme Court of Appeal for Great Britain, in cases arising in the United Kingdom, although its jurisdiction is exercised in fact by the Lord Chancellor and six law lords. As already stated above, the upper chamber in various European countries may serve as a high court of justice for the trial of the chief of state, ministers, and all persons charged with offenses against the safety of the state. In the United States and some other countries it serves as a court for the trial of impeachment cases. In Chile it is a sort of "competence-conflict" court, charged with deciding disputes between the administrative and political authorities on the one hand, and the superior courts of justice on the other. In Germany under the old constitution it exercised numerous judicial and administrative powers. In France and Poland its consent is necessary to a dissolution of the Chamber of Deputies. In the United States its assent is necessary to the validity of presidential appointments to public office and to the ratification of treaties, and in Chile it is charged with advising the president upon any questions upon which he may desire its opinion. In Chile also proposed laws relating to amnesties and general pardons may originate only in the senate.

On the other hand, upper chambers generally are on a footing of inequality with the lower chambers in respect to financial legislation. In Great Britain, the United States, France, and various other countries, particularly those of Latin America, revenue bills cannot be initiated

<sup>72</sup> Ogg and Ray, "Introduction to American Government," p. 346.

in the upper chambers. In France there is a difference of opinion as to whether the Senate has power to amend or reject the budget as passed by the lower chamber. The preponderance of opinion seems to be that while the Senate has no power to propose appropriations or new taxes it may reduce amounts voted by the lower chamber and may even restore items in the budget proposed by the ministry but which have been stricken out by the lower chamber.<sup>73</sup>

<sup>73</sup> As to this see Duguit, "Droit const." (1911), vol. II, p. 337, and Esmonin, "Droit const." (5th ed.), p. 909.

## CHAPTER XXI

### THE LEGISLATIVE ORGAN (*Continued*)

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#### V. CONSTITUTION OF LOWER CHAMBERS

**General Principles.**—Concerning the constitution and mode of recruitment of the lower chamber there is now substantial unanimity of opinion and of practice that it should rest upon a popular basis, that its members should be elected by direct, equal, secret, and what is commonly described as universal suffrage, and that the tenure of their mandates should be of relatively short duration. Prior to the recent constitutional changes in Europe, this view and practice was not, however, universal. In some of the German states (notably

Prussia) the lower chambers were chosen indirectly by electors who themselves were elected according to a three-class system under which the voters were grouped on the basis of the amount of the taxes which they paid. The result was in large measure the disfranchisement of the working and professional classes and the devolution of the legislative power upon the representatives of the wealthy, and especially the large land-owning classes.<sup>1</sup> An almost equally undemocratic system prevailed in Austria until 1907. In Belgium prior to 1921 where, as pointed out in a previous chapter, a system of plural or weighted voting prevailed,<sup>2</sup> the Catholic party was able to elect the majority of the members of the lower Chamber, while, in consequence of the system, the strength of the Liberal and Socialist parties was greatly reduced.<sup>3</sup> To-day, however, there appear to be no lower chambers in Europe or Asia which are indirectly elected or elected upon the basis of a restricted or unequal suffrage.

**The Basis of Representation.**—A principle which is now almost universal is that representation in the lower chamber (and in some states likewise in the upper chamber) shall be based upon the total population, including citizens and aliens alike, men and women, adults and minors, rather than upon the number of voters. In several states of the American union, however, there are deviations from this principle. Thus in Alabama and Idaho the basis of apportionment is the total number of votes polled at the preceding election; in Arkansas and Indiana it is the number of male inhabitants 21 years of age or over; in Massachusetts it is the number of legal voters; and

<sup>1</sup> In consequence of this arrangement the Social Democratic party, whose membership was composed in preponderating part of the working classes, small shop keepers, and to some extent of professional men, although able on occasions to elect as many as 100 members to the imperial Reichstag, which chamber was elected on the basis of manhood suffrage, were rarely able to elect any members at all to the lower chamber of the Prussian legislature, which rested on the three-class system described above. Thus in the Prussian elections of 1903 the two conservative parties with 372,132 votes elected 202 members of the Landtag, while the Social Democratic party with 314,149 votes did not elect a single member. Again in the elections of 1908 the Conservatives returned 212 members while the Social Democrats elected none. As to this extremely undemocratic system of representation see the details in Barthélémy, "Les institutions politiques de l'Allemagne contemporaine," pp. 68 ff. Also an illuminating article by Ch. Brocard, entitled "La réforme électorale en Prusse et les partis," *Rev. Pol. et Parl.*, July, 1912, pp. 287 ff.

<sup>2</sup> See *supra*, p. 552.

<sup>3</sup> See Reed, "Government and Politics of Belgium," p. 41.

in North Carolina aliens are not counted in determining the basis of representation. In France there has been considerable public sentiment in recent years in favor of basing representation in the parliament upon the French population alone and of excluding aliens from the basis of apportionment—this for the reason that the presence of large numbers of aliens in certain districts and their almost total absence in others leads to inequalities of representation which are artificial and unjust.<sup>4</sup> Something might be said in favor of basing representation upon the voting population alone, but in most constituencies it would make little difference in the result.

#### **Deviations from the Principle of Equality of Representation.**

While it is the theory that representation shall be based upon population and that constituencies of substantially equal population shall be equally represented, in fact there are frequent deviations from the principle. Thus it is a common provision in constitutions (for example in the American and the French constitutions) that each state, county, town, or district shall be entitled to at least one representative however small its population. As a consequence of such a provision four American states (Delaware, Nevada, Wyoming, and Arizona) elect one representative each to Congress although their populations are below the Congressional quota—that of Nevada far below it. So in France there are, or were recently, some districts with populations of less than 14,000 each which elected one deputy, while there were others with populations exceeding 112,000 which elected only one.<sup>5</sup> In some American states the constitutional provision that each county, regardless of its population, shall be entitled to one and only one senator, plays havoc with the principle of equality of representation. Thus in New Jersey under the operation of this rule Cape May county, with a population of about 20,000 inhabitants, elects one senator while Essex county, with a population in excess of 500,000, elects but one senator. Somewhat similar inequalities are found in Maryland, South Carolina, and other states. In some of the New England states where the town system of representation in the legislature prevails, the in-

<sup>4</sup> Thus according to the census of 1906 the arrondissement of Briey had a population of 100,525 and elected two deputies although about 26 per cent of the population were aliens. Somewhat the same situation existed in the arrondissement of Nice, where one third of the population were aliens.

<sup>5</sup> Compare Moreau, "Pour le régime parlementaire," p. 294.

equalities are still more flagrant. Thus in Connecticut certain small towns with four or five hundred inhabitants each have the same number of representatives as cities like New Haven with 150,000 inhabitants.<sup>6</sup> The four principal cities of that state contain about a third of the total population, yet they elect less than one thirtieth of the representatives in the lower house of the legislature. The provisions in some state constitutions which limit the number of representatives which certain counties having large cities may elect (e.g., New York and Rhode Island) also lead to flagrant inequalities of representation.

**Redistribution Requirements.**—In order to insure a correspondence between the representation of a district (or in the case of federal unions, of a state or province) and its growth in population, some constitutions (e.g., the constitution of the United States and those of some of the individual states) require that a census of the population shall be made at stated intervals and that there shall be a reapportionment or redistribution of representation, on the basis of the results thereof. But there is no way of enforcing compliance on the part of the legislature to whom such injunctions are addressed.<sup>7</sup> For many years it was a standing complaint by the Social Democratic party in Germany that no substantial redistribution of seats in the Prussian legislature was ever made subsequent to 1860 and none at all of seats in the Reichstag after 1871. In consequence of the growth of cities it came to pass that they were greatly under-represented in comparison with the rural districts, which were correspondingly over-represented.<sup>8</sup> All together it was quite the most unequal system of representation in the world. Since the strength of the Social Democratic party lay chiefly in the great industrial centers while that of the Con-

<sup>6</sup> Compare Dealey "Our State Constitutions," p. 72; Ford, "Rural Domination of Cities in Connecticut," *Mun. Affairs*, vol. VI (1902), pp. 220 ff., and Jones, "The Rotten Boroughs of New England," *North Amer. Rev.*, Apr., 1913, pp. 486 ff.

<sup>7</sup> Thus there is a provision in the constitution of Illinois requiring that a reapportionment of representatives shall be made every ten years, but the legislature did not comply with the requirement after the census of 1910 nor after that of 1920. Likewise the Congress of the United States made no reapportionment of federal representatives after the census of 1920.

<sup>8</sup> Details in Ogg, "Government of Europe," pp. 644, 661. As already stated above, the three-class system of voting in the Prussian elections was sufficient, even under an equitable system of representation, to keep Social Democratic representatives out of the legislature.

servative parties was mainly in the country districts, the effect was to keep down to relatively small proportions the representation of the former, and it was for this very reason that the ruling classes refused to permit a redistribution of seats.

**Electoral Circumscriptions.**—For convenience in choosing representatives and to insure a closer relationship between the representative and his constituents, it is the practice in all countries to divide the territory into electoral circumscriptions, districts, or constituencies, from each of which, ordinarily, one representative is chosen. The entire chamber might be chosen from the country at large on a general ticket, each elector being allowed to cast a vote for the entire number ; but in states of considerable area, where several hundred members are to be elected, such a method would obviously be impracticable. The time and effort involved in voting such a ballot would be considerable ; and what is of more importance, the ignorance of the elector concerning the candidates from distant parts of the state would be so great that an election under such circumstances would be largely a guess.

**General Ticket versus Single-Member District.**—In the laying out of electoral districts two methods are employed : one is to divide the state into as many districts as there are representatives to be chosen and allow a single member to be chosen from each ; the other is to create a smaller number of districts, from each of which a number of representatives is chosen at large on a general ticket. The former is known as the single-member district plan; the latter, as the general ticket method. Each has been employed by most states at different times in their history, but nearly all came ultimately to adopt the single-member district method, although the recent spread of the system of proportional representation has necessitated the adoption of the general ticket system in one form or another in the countries where it has been introduced except where the form is that of the single transferable vote. In the United States, for a long time, representatives in Congress were chosen from the state at large, each elector being allowed to cast a vote for the entire ticket ; but the objections to the method were so serious that Congress in 1842 enacted that thereafter they should be chosen by districts containing as nearly as possible equal populations, and this rule still prevails.

In Great Britain the single-member district method has long prevailed, though from 1867 to 1885 a few of the more populous boroughs were permitted to choose their members by general ticket. These were the so-called "three-cornered" constituencies, thirteen in number, in which a minority of not less than two fifths was allowed to choose one member.<sup>9</sup>

**French Practice.**—The method first employed in the Third French Republic for choosing members of the Chamber of Deputies was the single-member district system (*scrutin d'arrondissement* or *scrutin uninominal*); but in 1885 the general ticket method was adopted, under which all the deputies apportioned to each department were elected from the department at large by general ticket (*scrutin de liste*). Under this law the 38 deputies to which the department of the Seine was entitled were elected on a single ballot, each elector having .38 votes. In consequence of the alarm in 1889 caused by General Boulanger's threat to take a plebiscite of France on the issue of his dismissal from the army and the success which he achieved in several elections,—a success which was greatly facilitated by the general ticket system,—the French parliament made haste to abolish the system and to restore the single-member district system.

In time, however, widespread dissatisfaction with the latter method grew up and a demand was made for a return to the general ticket system. The chief grounds of complaint were that the system of election from small districts had the effect of lowering the character of the chamber by making the representative a mere agent (*mandataire*) of his petty district—*députés de clocher* they were called—charged by his constituents with obtaining appropriations for public works, construction of rail-roads, appointments to office, decorations for prominent residents, etc. The system was denounced as *députantism* instead of *parliamentarism*; as Gambetta in his day had declared France to be, under such a system, a *miroir brisé*, so Briand and others now declared her to be a *mare stagnante*. Furthermore, election from small districts greatly facilitated the power of the government to control the elections, as experience during the Second Empire and

<sup>9</sup> Of the existing 595 constituencies in Great Britain and northern Ireland, 576 elect one member each, 18 two members each, and there is one which elects three—the Scottish Universities combined.

during the presidency of MacMahon had clearly demonstrated. Finally, another result of the system was the existence of flagrant inequalities in the population of the districts and consequently inequalities of representation.<sup>10</sup> In these circumstances a law was passed in 1919 reestablishing a system of *scrutin de liste* but different from the system of 1885 in that it was coupled with a system of proportional representation and subject to the restriction that not more than six deputies should be chosen on a general ticket; that is, the department should be the election district only in case it was not entitled to more than six members. Without this latter modification the 50 deputies to which the department of the Seine was entitled would have been elected from the department at large upon general ticket, each elector having 50 votes—a system which would obviously have been impracticable. The working of the law of 1919, however, proved unsatisfactory, and in 1927 it was repealed and France returned again to the system of *scrutin d'arrondissement*.

**Practice in Other Countries.**—Italian practice, like that of France, has oscillated between the two systems. From 1891 to 1919 the single-member district system was in force. In the latter year, however, Italy followed the example of France and returned to the general ticket system with proportional representation. Under the régime of Mussolini certain changes to be explained below have been introduced. In the other countries where schemes of proportional representation have recently been introduced the general ticket system has necessarily taken the place of the single-member district system.

In the states of the American Union the single-member district method of choosing representatives is the rule, though there are a few exceptions. Likewise in the choice of members of municipal councils the district or ward method generally prevails, especially where the single-chambered council exists, though there are some notable exceptions, especially in cities which have introduced the commission form of government. In some municipalities a mixed system is employed, according to which a certain number of members, in addition

<sup>10</sup> I have reviewed the history of this movement and discussed the arguments which were put forward in favor of the abolition of the *scrutin d'arrondissement* method of election, in an article entitled "Electoral Reform in France," *Amer. Pol. Sci. Review*, vol. VII (1913), pp. 610 ff.

to the ward representatives, are chosen from the city at large on general ticket.

**Advantages of the Single-Member District Method.**—One advantage of the single-member district method is its simplicity and convenience. Where the country is divided into as many electoral circumscriptions as there are representatives to be chosen, the task of the voter in each district is restricted to the simple duty of casting a ballot for one representative. Owing to the necessarily restricted area of the electoral district under this system, the chances are considerable that the candidate will be better known to the voters than would be possible under the general ticket system, which requires larger districts,<sup>11</sup> and that he will in turn be more familiar with the needs and conditions of the district which he is chosen to represent. It affords a means of establishing a closer relationship between the elector and his representative; it tends to increase the responsibility of the voter in choosing his representative and at the same time perhaps intensifies the interest of the representative in and his responsibility to his constituency. The Hon. A. J. Balfour, speaking in the House of Commons on April 13, 1894, said, "I have always been of the opinion that the whole basis of representation in this House is a local basis, and that the various localities, when they send representatives here, while conscious, of course, of the imperial obligations resting upon them, must vote as localities and have regard to the interest of localities."<sup>12</sup> Experience has shown in fact that the election of representatives on a general ticket from large districts will not prevent them from regarding themselves as the immediate representatives of a particular part of the district. By agreement and understandings among them they are likely to divide the district into small constitu-

<sup>11</sup> Among the advocates of the single-member district method were Montesquieu ("Esprit des lois," English ed. by Prichard, vol. I, p. 166), Sidgwick ("Elements of Politics," p. 396), Bluntschli ("Politik," p. 444), Esnlein ("Droit constitutionnel," p. 205), Brougham ("The British Constitution," "Works," vol. XI, p. 73), and Bradford ("Lessons of Popular Government," vol. II, p. 168). Where several candidates are chosen from the same district, says Bradford, the voter "has to decide upon their relative merits without even the party guide, a task for which he is unfitted, and which, unless he has some special object to gain, he will renounce in disgust." The system is favored by Laski (*op. cit.* p. 318), subject to the qualification that no constituency should be limited by law or custom to the choice of a resident of the district.

<sup>12</sup> *Parl. Debates*, 4th series, vol. XXIV, p. 386.

encies, each charging himself with the care of the particular interests of the one which he regards as his own. Indeed, according to Poincaré and others, this is actually what happened in France when the general ticket system was introduced in 1885. Each former circonscription insisted upon its own particular deputy to look after its special interests and by mutual agreement such an arrangement was brought about.<sup>13</sup> The constitution of France and of the European countries generally expressly declare that deputies shall be the representatives of the entire nation and not of their particular districts, but as Carré de Malberg has conclusively shown, such provisions are, certainly in France at least, mere pious declarations which mean little or nothing in fact.

Another advantage of the single-member district method is that it tends to secure representation of the minority party in the state, city, or province, as a whole. Obviously, if all the representatives are chosen at large on a general ticket, the party having a bare majority will elect all and the minority none. Thus in the United States, as long as representatives in Congress were chosen from the state at large, the majority party in each usually elected the entire congressional delegation; whereas if the district ticket method had prevailed, some districts in states not overwhelmingly in control of one party or the other would have chosen representatives belonging to the minority party. The injustice of such a scheme led to the substitution of the district method, as has been said, by an act of Congress in 1842. In the same way it happened under the general ticket system established in France in 1885 that the majority party in the department was able to elect all the deputies to which the department was entitled (in case of the department of the Seine 38 altogether) and the minority elected none. If such a system had been established in 1919 without a system of proportional representation the Radical and Radical Socialist parties with 216,000 votes in the department of the Seine would have been able to elect all the 50 deputies to which the department was then entitled, while the votes of the 197,000 "unified" Socialists and those of the Progressists, Nationalists, and Clericals would have counted for nothing.

<sup>13</sup> Poincaré, "Vues politiques," in *La Revue de Paris*, April 15, 1910 (vol. XVII), p. 851, and Ferneuil, "La réforme électorale," *Rev. Pol. et Parl.*, vol. LIX, p. 465.

**Objections to the Single-Member District System.**—The objections to the single-member district method are: first, that it narrows the range of choice and often leads to the election of inferior men. This is notably the case in the large cities where the ward system of choosing aldermen is almost universal. Experience abundantly proves that in cities where such a system prevails not only inferior, but often corrupt, representatives are chosen. In the second place, the district system leads to the choice of men who regard themselves as the representatives of local interests rather than men who consider themselves as the representatives of the interests of the country as a whole, and the men chosen therefore are likely to take a narrow and particularistic view of public questions instead of a broad national view. The experience of both France and Italy with the *scrutin d'arrondissement* system of choosing deputies clearly established the truth of this statement.<sup>14</sup>

The district system encourages the view that the representative is the *mandataire* of his constituency rather than of the country; that, in short, he is commissioned to represent a part rather than the whole of the state. As pointed out above, it facilitates the power of the government to control the elections, since the smaller the district the more easily it can influence the decisions of a sufficient number of voters to obtain the return of government candidates. This evil has been especially great on the continent of Europe and it constituted one of the principal reasons which led the French in 1919 to abandon for a time the system of *scrutin d'arrondissement*. Moreover, the custom which regards the legislator as the representative of a particular locality is responsible for the election of men whose energies are likely to be engrossed with the pressure of petty local influences, and therefore often deprives the state of the services of able statesmen who would be willing to serve in the legislature could they be freed from such influences.

In the third place, the system increases powerfully the temptation of legislative majorities to "gerrymander" the state, that is, to

<sup>14</sup> See my article on "Electoral Reform in France," cited above, where a summary of French opinion will be found.

construct the electoral districts in such a way as to give the majority party more representatives than its voting strength entitles it to.<sup>15</sup>

**Qualifications for Membership in the Legislature.**—The constitutions of all states prescribe certain qualifications for eligibility to the office of representative, and some expressly lay down a number of disqualifications. The qualifications relate for the most part to citizenship, age, and residence; the disqualifications relate mainly to the incompatibility of the legislative function with that of public office. The propriety of excluding aliens from membership in the legislative body is universally recognized, for the reason that aliens, owing no permanent allegiance to the state and having perhaps only a transient interest in its welfare, cannot be expected to possess the requisite qualifications for participating in its government. Moreover, their presence in the legislature would afford a possible means through which the mischiefs of foreign influence might find their way into the public councils.<sup>16</sup>

Practically all constitutions require of the representative the attainment of a certain age, for the reason that the experience and knowledge necessary to a successful discharge of legislative duties are not likely to be possessed by minors. Some states, like Great Britain, require merely the attainment of the majority—twenty-one years of age, and this is the rule in the British dominions;<sup>17</sup> most states, however, insist on a higher age, twenty-five for the lower chamber, thirty for the upper, while some require the attainment of a greater age. Thus Belgium, France, Italy, and Poland require the attainment of forty years for membership in the upper chamber, although only twenty-five years for membership in the lower chamber. Czechoslovakia requires 30 years for the lower house and 45 for the upper; Chile

<sup>15</sup> See Commons, "Proportional Representation," ch. 3, for a discussion of the evils of the district system with particular reference to the practice of gerrymandering; see also Reinsch, "American Legislatures," pp. 703-299.

<sup>16</sup> Cf. Story, "Commentaries," vol. I, sec. 618; also *The Federalist*, No. 62.

<sup>17</sup> Story observed that "all just reasoning" is against the view that the mere attainment of the twenty-first year is a proper age qualification for membership in the legislative body ("Commentaries," sec. 617). But compare Bluntschli ("Allgemeines Staatsrecht," bk. II, ch. 5), who pointed out that the English statesmen Pitt, Burke, Fox, Grey, Canning, and Lord John Russell were all in Parliament at the age of twenty, as was also true of the Hungarian statesman Francis Deak.

21 years for the chamber of deputies and 35 years for the senate. A few, like Denmark, make no distinction between the age requirements for eligibility to the two chambers.

**The Residence Requirement; European Practice.**—Residence in the district which the member represents is required by positive law or custom in many states. In the United States the representative in Congress is required by the constitution to be an inhabitant of the state, but neither the constitution nor the statutes require that he shall be a resident of the district. Nevertheless, a custom so strong and universal as to possess almost the force of positive law requires that he shall be a resident of the district, and this rule has rarely been disregarded in practice.<sup>18</sup> The popular notion is that an actual resident will feel a deeper concern and possess a more intimate knowledge of the needs and conditions of his constituents than a non-resident would. In England, formerly, residence in the district was required by law; but for a long time the rule was systematically ignored, and the statute requiring it was repealed in 1774. "It was found," said Judge Story, "that boroughs and cities were often better represented by men of eminence and known patriotism, who were strangers to them, than by those chosen from their own vicinage."<sup>19</sup> The election of non-residents to represent constituencies to which they are to all intents and purposes strangers is an occurrence so common in England that it has come to be almost as much the rule as the exception. There has been no parliament for many years which has not contained a large number of members who represented districts in which they were not residents. The English practice not only has the effect of securing the election of representatives who are more free from the tyranny of petty local interests and who are likely to take broad national views of public questions, but it affords a means of bringing into and retaining in public life able men who otherwise would be unable to obtain seats in parliament. There have been times when some of the most distinguished leaders in English public life would have been in retirement had a residence requirement been enforced.<sup>20</sup> Under the English practice the continuance

<sup>18</sup> In a few instances, especially in the large cities where the districts are small, "downtown" districts have elected residents of "uptown" districts.

<sup>19</sup> *Op. cit.*, sec. 619.

<sup>20</sup> Two recent examples of the working of the English rule were the election

in public life of a great statesman and leader is not dependent upon the favor of a particular constituency which may refuse to return him for local or personal reasons having no relation to his qualifications.

On the continent of Europe neither constitutions nor customs limit the choice of representatives to the residents of districts from which they are chosen. Non-residents are frequently chosen; in fact most of the French colonial deputies and senators are non-residents and instances are not lacking in which Parisians have been chosen to represent colonies which they had never even visited before announcing their candidacies.

**Results in America.**—In the United States, where the opposite practice prevails, the country has, as a consequence, been deprived at times of the services of some of its ablest and most experienced statesmen.<sup>21</sup> Lord Bryce thus criticized the American custom of limiting the choice of representatives to residents of the district: "The mischief is twofold. Inferior men are returned, because there are many parts of the country which do not produce statesmen, where nobody, or at any rate nobody desiring to enter Congress, is to be found above a moderate level of political capacity; and men of marked ability and zeal are prevented from forcing their way in. Such men are produced chiefly in the great cities of the older states. There is not room enough there for all of them, but no other doors to Congress are open. Boston, New York, Philadelphia, and Baltimore could furnish eight times as many good members as there are seats in these cities. As such men cannot enter from their place of residence, they do not enter at all, and the nation is deprived of the benefit of their services. Careers are moreover interrupted. A promising politician may lose his seat in his own district through some fluctuation of opinion or perhaps because he has offended the local wire-pullers by too much independence. Since he cannot find a seat elsewhere

<sup>21</sup> Ex-Premier A. J. Balfour in 1905 by a London district after he had been defeated in his home district of Manchester; and the election in 1908 of Winston Churchill, a member of the cabinet, by another constituency after his defeat in the district of which he was a resident.

<sup>21</sup> In this way the Democrats lost the services of their leader, William R. Morrison, and the Republicans their leader, William McKinley, in 1891. Compare Commons, "Proportional Representation," pp. 41-42.

he is stranded; his political life is closed, while other young men inclined to independence take warning from his fate."<sup>22</sup>

**Property Qualifications.**—Property qualifications for membership in legislative bodies were very common in former times and still survive in some countries. In Great Britain, for example, until 1858 the possession of an income of £600 was required of county members and £300 of borough members. Under the French charter of 1814 the payment of direct taxes to the amount of at least 1000 francs was required of all deputies, and this requirement lasted until 1848. In many of the early state constitutions of the United States membership in the legislatures was restricted to large landowners, tax payers, or owners of personal property of a certain amount.<sup>23</sup> With the advance of the democratic movement, however, property requirements have disappeared almost everywhere. They still survive only here and there for membership in upper chambers. In the Dominion of Canada, for example, the ownership of \$4000 worth of property is required for membership in the Senate; in the South African Union elected senators must be owners of unmortgaged real estate of the value of £500.<sup>24</sup> In Belgium the ownership of \$2400 worth of property, or the payment of \$240 of taxes, was formerly required for membership in the Senate, but that requirement was abolished in 1921. In Sweden the possession of real property of the value of 80,000 rix-dollars or an income of 4000 rix-dollars is required. In the Netherlands only the highest taxpayers are eligible; in Spain prior to 1931 grandees were senators of right only if they had a yearly income of 60,000 pesetas derived from real property of their own. There appear to be no existing lower chambers for which there is a property-owning qualification for membership.

<sup>22</sup> "American Commonwealth," 1910, vol. I, p. 195. Compare also the criticism by Ford in his "Representative Government," pp. 165 ff. See also the criticism of Laski, *op. cit.*, p. 318, who aptly remarks that the American practice is based on the false assumption that the ability at the command of the state is distributed with mathematical accuracy over the electoral districts.

<sup>23</sup> See an article by W. C. Morey entitled "Revolutionary State Constitutions," in the *Annals of the American Academy of Political and Social Science*, vol. IV; also an article on the same subject by W. C. Webster in the same publication, vol. IX.

<sup>24</sup> But this requirement may now be changed by the local parliament (since 1910).

The chief argument in favor of property qualifications for membership in the legislature is that the ownership of property is likely to be evidence of certain qualities in the individual which indicate legislative fitness, such, for example, as thrift, economy, intelligence, or business ability. Moreover, the man of means is more likely to have the time and opportunity for study and devotion to the public service than one who must devote a large part of his energies to earning a livelihood. As a matter of fact, where the principle of non-payment of members is the rule, as was formerly the case in European countries generally, and where even now the salary is not sufficient to cover the expenses of the members, it is practically necessary that they should have a private income, and thus the possession of property becomes an implied qualification.

**Disqualifications.**—It is a principle of representation well recognized in many states that legislative mandate and administrative office are incompatible and ought not to be intrusted to the same hands. Accordingly, we find in the constitutions of most states provisions disqualifying holders of certain offices from occupying seats in the legislature. In the United States the disqualification is practically absolute, exceptions being recognized only in the case of a few minor offices, the duties of which are hardly incompatible with the legislative function. It is practically the same in Chile (Const. 1925, Art. 29), where the mandate of a deputy or senator is declared to be incompatible with every salaried state or municipal office and with every service or commission of the same kind with the exception of educational service in the capital city.<sup>25</sup>

<sup>25</sup> The new constitution of Prussia (1920) apparently does not recognize any incompatibility between the holding of office and legislative mandate. It declares that officials, public employees, and workers for the state shall not be required to obtain leave to sit as deputies, that they shall also be entitled to the leave necessary to carry on their campaigns, and that the payment of their official salaries or wages shall continue during such leaves (Art. 11). The German federal constitution (Art. 39) contains similar provisions. That of Czechoslovakia (Art. 20) provides that civil servants shall be entitled to leave during their term as members of the legislature and also to their official salaries. But the constitution of Yugoslavia requires that they resign their offices for the term during which they are elected, though ministers and university professors may, while members of the legislature, retain their positions (Art. 73). That of Poland (Art. 16) require them to obtain leaves of absence but the rule does not apply to ministers and professors. But with the exception of the latter a deputy who is appointed to a salaried office loses his seat.

In states having the cabinet system of government, however, the doctrine of the separation of powers is not carried to the same length as in the United States, and the heads of the executive department are usually not only members of the legislature but are in fact its leaders. In Great Britain until 1919, however, when a member of the legislature was appointed to a cabinet office, he was required to resign his legislative mandate and seek re-election in order to give his constituents an opportunity to approve or disapprove of his assumption of an administrative office. This rule still prevails in a few Continental states.

Formerly religious qualifications were common both in Europe and in America, but with the growth of religious liberty and the separation of church and state such requirements have almost entirely disappeared.<sup>26</sup> In some states, however, certain ecclesiastical persons are debarred from sitting in the legislature. Thus in Great Britain the clergy of both the Roman Catholic Church and the Established Church of England are excluded from the House of Commons, and disqualifications of a similar nature exist in some of the Continental states; for example in Switzerland, where the Roman Catholic clergy are in effect debarred. In a few of the American states, notably Maryland and Tennessee, ministers of the gospel are ineligible to public office, which includes membership in the legislature.

**The Legislative Tenure.**—The principle of modern representative government requires that the tenure of the representative shall be limited. If it were perpetual, or even very long, the responsibility of the representative to his constituents could not be enforced. Under such circumstances representative government would obviously be such only in name, for a permanent mandate in a representative system is a contradiction of terms. There must be periodical elections if the will of the electorate is to be ascertained and made known to the representative and by him enacted into law. Concerning

<sup>26</sup> In a few of the American states, however, persons who do not believe in the existence of God or a future state of rewards and punishments are debarred from holding any office, legislative or administrative. Oaths are commonly required; but in England this requirement was abolished in 1845, following the unsuccessful attempt to unseat Bradlaugh for refusing to take the oath then required.

he necessity of frequent elections as a means of preserving the representative system there is to-day little difference of opinion; but as to the length of term sufficient to insure responsibility, there is no precise rule or principle of universal application, and as a matter of fact the practice of states varies widely. Thus we find the term of the representatives in the lower chambers varying from one year in two of the American states to five years (formerly seven) in Great

Ireland, though in the latter country, owing to dissolutions of parliament, elections in fact came oftener than seven years, the average duration of recent parliaments having been less than four years. In most of the Continental states it is four years, but in Poland it is five years and in Czechoslovakia it is six. In the British dominions the duration of the parliament in most cases is three years, but that of the Canadian parliament is five years and so it is in the provinces of Quebec and Ontario and the Union of South Africa.

It was the prevailing opinion in certain parts of America at the time of the adoption of the federal constitution that "where annual elections end, tyranny begins"; and this feeling lay at the basis of a good deal of the opposition to the constitution which disregarded this principle in fixing the term of national representatives at two years.<sup>27</sup> This opinion, however, was not general and the constitutions of only two of the states to-day, in fact, provide for annual elections of representatives.<sup>28</sup> In none of the European states has the principle of annual elections been introduced, the general practice there being four-year or five-year terms.

It may well be questioned whether the disadvantages and inconveniences of annual elections do not outweigh the advantages. The very frequency of elections, observed Judge Story, has a tendency to create agitations and dissensions in the public mind, to nourish factions and encourage restlessness, to favor rash innovations in domestic legislation and public policy, and to produce violent and sudden changes in the administration of public affairs founded upon temporary excitements and prejudices.<sup>29</sup> Short tenures and frequent elections involve heavy expense to candidates and to the people and lead to constant shifting in the membership of the legislature with the result that

<sup>27</sup> See *The Federalist*, No. 53.

<sup>28</sup> New York and New Jersey (for members of the lower house).

<sup>29</sup> "Commentaries," vol. I, sec. 593.

it is always composed in large part of new and inexperienced members.<sup>30</sup> With regard to the frequency of election necessary to preserve the representative principle, about all one can say is that the mandate ought to be neither too short to defeat its purpose nor too long to remove the representative from all popular control. There is a popular belief that, where no other circumstances affect the case, the greater the power, the shorter ought to be its duration. Fisher Ames in his day very well remarked that the term ought to be so long that the representative may understand the interests of the people, and yet so limited that his fidelity may be secured by a dependence upon their approbation. John Stuart Mill stated the general principle as follows: "On the one hand, the member ought not to have so long a tenure of his seat as to make him forget his responsibility; take his duties easily, conduct them with a view to his own personal advantage, or neglect those full and public conferences with his constituents which, whether he agrees or differs with them, are one of the benefits of representative government. On the other hand, he should have such a term of office to look forward to as will enable him to be judged not by a single act, but by his course of action."<sup>31</sup>

It may be doubted whether a five- or six-year term such as now prevails in Poland and Czechoslovakia and the still longer terms of eight, nine, and twelve years for senators in Chile, France, and Ireland, are conducive to effective popular control, especially in countries where the senate cannot be dissolved, although it undoubtedly possesses distinct advantages such as result from longer experience and the freedom of the member from the necessity of engaging in frequent election campaigns in order to keep his seat in the legislature. Democratic logic would seem to require that where the legislative tenure is a long one, some form of the device known as the "recall" should be provided in order to insure that the representative shall be responsive to the opinion of the electorate.<sup>32</sup>

**Payment of Members; American Practice.**—Whether members of legislative assemblies should be paid salaries out of the public treasury for their services was once a much controverted question, and until recently there existed a wide divergence of practice in regard to the matter. In the United States, members of both houses

<sup>30</sup> As to this see Jones, "Statute Law Making," pp. 12-13.

<sup>31</sup> "Representative Government," ch. 11.      <sup>32</sup> Compare Laski, *op. cit.*, p. 320.

of the national and state legislatures, and in most cities, the members of municipal councils, have from the beginning received compensation either in the form of a specified sum or a *per diem* allowance, and in addition it has been customary to allow them a certain sum known as "mileage" to cover their traveling expenses to and from the meeting place of the legislature. The federal constitution and many of the state constitutions have left the legislature free to determine the amount without restriction, but in late years there has been a tendency among the states to limit by constitutional provisions the amount which the legislature may vote itself, especially where the compensation takes the form of a *per diem* allowance. It is also a common provision that no increase in the amount of compensation may apply to the legislature which votes the increase.

**European Practice.**—In Europe, for a long time, the contrary practice was followed, for there the view prevailed that service in the legislature ought to be gratuitous. But with the rise of the Socialist and Labor parties and the election to the legislatures of workingmen who were dependent for their livelihood upon the wages or salaries received from their labor, which sources were necessarily cut off wholly or partially when they became members of the legislature, there grew up a strong demand that they should be compensated by the state for their legislative services.<sup>33</sup> In Germany when representatives of the Social Democratic party began to obtain seats in the legislature, in the absence of provisions for the payment of salaries out of the public treasury for their services, the party, by means of voluntary contributions, raised a sum for defraying the expenses of its members. But Bismarck, considering this practice to be in violation of the constitution, caused a suit to be brought against the party and the court sustained his contention and put a stop to the practice.<sup>34</sup> It was not until 1906 that the Reichstag abandoned the old practice and provided that its members should receive a small salary (3000 marks; about \$750 per year) to be paid out of the imperial treasury. The present constitution (Art. 40) declares that they shall have a right to compensation provided by national law, as well as free transportation

<sup>33</sup> Compare Horwill, "The Payment of Labour Representatives in Parliament," *Pol. Sci. Quar.*, June, 1910.

<sup>34</sup> Lowell, "Governments and Political Parties in Continental Europe," vol. I, p. 254.

on all German railways. The constitution of Prussia (Art.<sup>28</sup>) contains a similar provision for the benefit of members of the Landtag. The constitution of Czechoslovakia (Art. 27) provides that members of both chambers shall have a right to remuneration as provided by law. That of Belgium (Art. 52) as amended in 1921 expressly fixes the amount which members of the Chamber of Deputies shall receive (12,000 francs per year) and provides that they shall be entitled, in addition, to free transportation on all state or concessionary railways. But it also expressly provides that senators shall receive no salary further than an indemnity of 4000 francs per year for their expenses (Art. 57). Some of the new European constitutions are silent on the question, in which case the whole matter is left to the discretion of the legislature. This is the situation in France, where both senators and deputies at present receive the same "indemnity" (25,000 francs per year). In Italy compensation for members of parliament out of the state treasury was first provided for in 1912. In Great Britain members of the House of Lords have never received compensation for their services as members and this was true of the House of Commons until 1911, when in consequence of the demands of the Labor party, which had already for some years followed the practice of contributing from the party funds certain sums for the support of its members in the House,<sup>35</sup> Parliament passed a resolution providing that members of the House of Commons, other than those who were already in receipt of a salary as minister, officer of the House, or officer of the royal household, should receive a salary of £400 per year. In the British dominions members of the lower chambers of all the parliaments, national and local, now receive salaries paid out of the public treasury, and the same is true of those of the upper chambers with some few exceptions. In most cases it is also provided that they shall have free transportation over the railroads where they are owned by the state; otherwise they shall be allowed "mileage" or traveling expenses.<sup>36</sup>

<sup>35</sup> But the House of Lords, following the German decision of 1885 referred to above, had ruled in 1909 in the famous *Osborne Case* that the payment of parliamentary members as such from dues collected by labor organizations was contrary to law. It was this decision which intensified the demand of the Labor Party for provision for the payment of legislative salaries out of the public treasury. See Webb, "History of Trade Unionism" (1911), pp. 344 ff.

<sup>36</sup> As to the details see Keith, "Responsible Government in the Dominions," vol. I, pp. 503-504.

**Merits and Demerits of Payment of Members.**—The result of recent constitutional or parliamentary legislation is that the practice of payment of members of legislative assemblies out of the public treasury (with the exception of the members of a few upper chambers) is now universal, and consequently the merits of the question have to a large degree been removed from the domain of theoretical discussion. Under modern conditions with the legislative bodies of many countries composed in large part of the representatives of the Labor and Socialist parties, who generally are not in the possession of private incomes sufficiently large to enable them to render gratuitous service to the state, and with the increasing democratization of the processes of election which necessarily entail heavy expenses upon candidates, the payment of salaries by the state is a necessity, if representatives without adequate private means are in fact to be available for service in the legislature. On the other hand, as Mill pointed out in his book on "Representative Government," where the system of compensation prevails the tendency is to give politics the character of a gainful profession, to make seats in the legislature the objects of desire on the part of politicians, and to attract into the legislature incompetents instead of able men who would regard service in the legislature as a public duty the successful performance of which is in itself reward enough. It can hardly be denied that in so far as the system of payment applies to service in American municipal councils the objections which Mill foresaw have by no means been lacking.<sup>37</sup> Outside the United States, the scale of compensation is relatively low; in some countries it is hardly sufficient to cover the living expenses of the member during the legislative session. In certain European countries where the size of the legislature is very large (in Great Britain 615 members of the House of Commons ; in France 929 senators and deputies) the burden of a scale of legislative salaries which would amount to a lequate compensation for the time and labor of the members would be larger than public opinion would tolerate. In comparison with European standards the scale of compensation in the United States is high, but on account of the heavy expenses of candidates resulting from the existing democratic processes of election, especially from the system of primary elections, it is in many cases hardly sufficient to cover such expenses.

<sup>37</sup> Compare Ford, "Representative Government," p. 207.

## VI. REPRESENTATION OF MINORITY PARTIES

**Early Advocates.**—The question whether the constitution should not guarantee representation, proportional or otherwise, to the minor political parties in the state, especially the more important ones, has had supporters dating from an epoch when in practice the principle of minority representation was unknown. John Stuart Mill in his classic book on "Representative Government," published in 1861, declared that "it is an essential part of democracy that minorities should be adequately represented." "No real democracy, nothing but a false show of democracy," he said, "is possible without it." "Nothing is more certain," he affirmed, "than that the virtual blotting out of the minority is no necessary or natural consequence of freedom, but instead is diametrically opposed to the first principle of democracy: representation in proportion to numbers."<sup>38</sup> Mill lamented that most existing democracies were not "governments of the whole people, by the whole people, equally represented, but governments of the whole people, by a mere majority of the people, exclusively represented." He readily admitted that the majority must rule in a representative system and that the minority must yield to its will; but from that it does not follow that the minority should have no representation at all. "In any really equal democracy," he said, "every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man they would be as fully represented as the majority, and unless they are, there is not equal government, but a government of inequality and privilege—contrary to all just govern-

<sup>38</sup> Ch. 7. Compare also Lecky, who observed that "it can hardly be contended that the substitution of a representation of the whole nation for a representation of a mere majority is contrary to democratic principles." "Democracy and Liberty," vol. I, p. 220. Compare also Lieber, who remarked that "essential representation requires a fair representation of the minority." "Civil Liberty and Self-government," p. 175. Lord Acton more recently declared that the remedy for one of the greatest evils of democracy (the tyranny of the majority) is proportional representation. "It is," he said, "profoundly democratic, for it increases the influence of thousands who would otherwise have no voice in the government; and it brings men more near an equality by so contriving that no vote shall be wasted, and that every voter shall contribute to bring into parliament a member of his own opinion." Quoted by Sir J. F. Williams, "The Reform of Political Representation" (1918), p. ii.

ment, but above all contrary to the principle of democracy which professes equality as its very root and foundation."<sup>39</sup>

**Criticisms of the System of Majority Representation.**—The system of majority representation is criticized as undemocratic and unjust because it in effect permanently disfranchises large numbers of electors and leaves them without representation because they are politically in a minority in their constituencies. Indeed it may, and not infrequently does, happen that a majority of the representatives in the legislature are returned by a minority of the electors. Against this, however, it may be argued that, although the minority party in a given constituency may have no representation of its own, the same party is often in the majority in other constituencies, and thus the representatives chosen by the party in those districts where it is in the majority represent the party in those in which it is in the minority. Thus it may be said that the Republican minorities in the Southern states of the American union are represented in Congress by Republican members from the Northern states, while the Democrats of New England are represented by the Democratic members returned from the South. But it will be replied that no such theory of representation is sound, because a representative chosen by a constituency in one part of a state as vast as the republic of the United States cannot adequately represent the members of the party living in remote parts of the country.

It often happens in the United States, both in the national and in the state legislatures, as well as in the municipal councils, that the majority party elects a larger number of representatives than it would be entitled to on the basis of its numerical strength. Thus in the presidential election of 1904 the Republican party, while casting only 54 per cent of the total vote in the country at large, elected 65 per cent of the representatives in Congress. In 1906 the Democratic party in Pennsylvania cast more than a half million votes but did not elect a single representative in Congress. In Indiana the Republicans actually cast less than half of the total vote but elected all the representatives. Instances

<sup>39</sup> "It is to go contrary to the evidence," says Duguit, "to affirm that a parliament chosen according to the pure majority system expresses more exactly the will of the nation, than one in which the different political parties in the state have their representatives. If the nation itself directly expresses its will, it must be the nation composed of its different parties—it is necessary, in short, that the parliament should be composed of the same elements as the nation. It is the only system which is adequate." "Droit const." (1911), vol. I, p. 379.

of this kind in national, state, and municipal elections might be multiplied. Nor are they by any means lacking in European countries.\* The minority party in a constituency usually does not secure any representation under such a system, and, taking the aggregate result in all the districts over which the election extends, one party or the other secures less than the representation to which its aggregate numerical strength entitles it.

**Movement for Proportional Representation.**—With the passing of time the demand for a system of representation which would prevent or attenuate results such as these, which to large numbers of persons seemed utterly inconsistent with the true principles of representative government, grew in volume. An extensive literature advocating the introduction of a system of proportional representation appeared and public opinion was instructed and informed by means of an active propaganda carried on by numerous societies and organizations.

Already before the World War the system in one form or another had been introduced for the election of representatives in national or local legislatures or in municipal councils in a good many countries, mainly European, particularly Denmark, Norway, Sweden, Switzerland, Belgium, Württemberg, Ireland, Bulgaria, Finland, Serbia, Portugal, Tasmania, and Cuba. During the war the principle was extended in Denmark and adopted in the Netherlands. Since the close of the war its progress has been remarkable, nearly all the newly adopted con-

\* Charles Benoist, a member of the French Chamber of Deputies and a well-known writer on the subject of proportional representation, made a report for the committee on universal suffrage in 1905, in which he showed that from 1884 to 1902 an average of only fifty-three per cent of the electors were represented in the chamber—that is, represented by deputies of their own parties. Thus, in 1902, 5,159,000 electors were represented in the chamber, while 5,818,000 were unrepresented. The famous separation law of 1905, he says, was passed by the vote of 341 deputies who represented exactly 2,647,315 electors out of a total electorate of 10,967,000. One can hardly claim, therefore, he concludes, that the laws of the French Republic represent the will of a majority of the country. See also his "De l'organisation du suffrage universel" in his "Crise de l'état moderne." Interesting statistics showing somewhat similar results in England following the election of 1918 may be found in Willoughby and Rogers, *op. cit.*, p. 267. As to the results of the election of 1929, see pamphlet No. 66 (July, 1929) of the Prop Rep. Society of Great Britain. It is there pointed out that the Labor Party elected 32 more members than the Conservative Party, although it polled 274,000 fewer votes.

stitutions having provided for it as the basis of representation in the national and in some instances in the local legislatures. It has also been introduced in Italy, and in Greece, and has been further extended in various countries in which it had already been adopted before the war.<sup>41</sup> In Great Britain, however, where the system had hardly gained a foothold before the war, provision was made by the Representation of the People's Act of 1918 for an experiment with it in 100 constituencies, but as yet it has not been actually tried out. In the four University constituencies the members are elected by a system of proportional representation known as the "Single Transferable Vote."

In the United States schemes for the representation of minority parties have made little progress. Under the Illinois constitution adopted in 1870 three representatives are chosen from each legislative district, and each elector is allowed three votes which he may cumulate on one candidate or distribute among the three in such manner as he pleases. In practice, the scheme has always (except in three instances) given the minority party at least one representative in each legislative district of the state. With only three exceptions also, third parties (Socialists, Progressives, or Prohibitionists) have been able by cumulating their votes to elect a few representatives—the number ranging from one to five in each legislature. Sometimes, however, owing to miscalculations of party strength or defective party discipline, the majority party secures only one of three members and the minority two.<sup>42</sup> But none of the other states have imitated the example of Illinois and the system is not likely to be retained in that state whenever a new constitution takes the place of the present one. It has, however, been introduced in a few American cities for the election of municipal councilors.<sup>43</sup>

<sup>41</sup> It also existed in limited form in France between 1919 and 1927. For want of space it is impossible here to describe the various forms of the system or the degree to which it is being applied in the different countries of Europe. Those who are interested in the subject will find the details in such books as Humphreys, "Proportional Representation" (1911), Sir John Fischer Williams, "The Reform of Political Representation" (1918), and in the various issues of *The Proportional Representation Review*. See also Willoughby and Rogers, "Introduction to the Problems of Government" (1921) ch. 15, and Rogers and McBain, "New Constitutions of Europe" (1922), ch. 5.

<sup>42</sup> As to its working see Moore, "The History of Cumulative Voting and Minority Representation, Illinois, 1870 to 1908."

<sup>43</sup> See McBain, "Proportional Representation in American Cities," *Pol. Sci. Quar.*, vol. 37 (1922), pp. 281 ff.

**Criticism of the Principle of Proportional Representation.**—Notwithstanding the recent remarkable spread of the system of minority representation in Europe it is still in the experimental stage in many countries, and a definitive judgment cannot yet be passed on the merits of the system. It has given general satisfaction in certain small countries such as Belgium, Denmark, and Switzerland, but it remains to be seen whether the results in Germany and France will equally commend themselves to public opinion. Many able political writers have condemned the system both on principle and because of the practical difficulties encountered in operating it. Sidgwick, for example, pointed out two "serious objections" to it. In the first place, the giving of representation to groups as such involves, he said, the loss of a valuable protection against demagogic by removing the "natural inducements which local divisions give for the more instructed part of the community to exercise their powers of persuasion on the less instructed." In the second place, representation of groups "will inevitably tend to encourage pernicious class legislation." Others maintain that it will tend to reduce the standard of efficiency in the legislature by securing the election of men who represent one set of interests or opinions rather than all of them. "We want for legislators," says Sidgwick, "men of some breadth of view and variety of ideas, practiced in comparing different claims and judgments, and endeavoring to find some compromise that will harmonize them as far as possible," which, he said, could hardly be secured under a system in which the community is not locally divided for electoral purposes.<sup>44</sup> The late Professor Esmein, the most eminent of French jurists of his day, was likewise a vigorous opponent of the whole idea. "To establish the system of proportional representation," he said, "is to convert the remedy supplied by the bicameral system into a veritable poison; it is to organize disorder and emasculate the legislative power; it is to render cabinets unstable, destroy their homogeneity, and make parliamentary government impossible." If applied to parliamentary elections, logic and consistency, he went on to say, require that it shall be applied to the election of executives and administrative officers, and this is but the entering wedge to anarchy. The law of the majority, he added, is one of those simple ideas which makes itself accepted straight off

<sup>44</sup> "Elements of Politics," p. 396.

the reel; it presents in advance this characteristic that it favors no one and puts all the voters on the same level.<sup>45</sup> Other objections which have been urged against the system are that it will multiply and strengthen party groups in the legislature and thereby render still more difficult the smooth and effective working of the cabinet system of government in countries where it exists; that it will result frequently in no one party having a workable majority and will thus lead to paralysis of legislation; that it will often lead to over-representation of small minorities; that its complexity makes it difficult of practical operation; that in by-elections it cannot be applied; that it will strengthen the influence of the party machine and of political bosses; that it will greatly increase the expense of candidates because of the larger electoral districts which it necessitates; and that it would create jealousies among candidates of the same party running on the same ticket.<sup>46</sup> In practice, some or all of these evils have actually accompanied the system in a number of states where it has been in operation for a considerable period.<sup>47</sup> It is hardly necessary to add that some of the objections apply with greater force to certain of the particular forms of proportional representation that have been introduced than to others.

<sup>45</sup> "Droit const." (5th ed.), pp. 256, 260. But see Duguit's reply, "Traité de Droit const." (1911), vol. I, p. 378, whose answer is in turn attacked by Carré d'Alberg in his "Théorie générale de l'état" (1922), vol. II, pp. 268 ff.

<sup>46</sup> Some of these objections are put forward by Mr. J. M. Robertson, M. P., in an article on "Proportional Representation," in the *Edinburgh Review* for July, 1917. See also the criticism of Laski, *op. cit.*, p. 316, and Finer, "The Case against Proportional Representation" (Fabian Society tract, 1924).

<sup>47</sup> Thus in Illinois in at least 24 instances since 1870 the minority party has succeeded in electing two of the three members to which the district was entitled, thus giving it a majority of the representatives; there is no evidence that it has raised the standard of character or ability of the legislative assembly; it has admittedly increased the power of the party machine; and worse than these it has frequently led to the choice of an assembly in which no political party had a majority, or at least, a workable majority that could always be counted on. Such was the situation in 1913-14 and 1915-16. No party having a majority, there was no responsibility and the deliberations of the assembly were characterized by strife, dissension, and legislative paralysis. One result of the system has been that frequently the party which elected the governor was unable to elect a majority of the assembly. In such cases there was a deadlock between the executive and legislative departments and consequently sterility of constructive legislation.

## VII. PROFESSIONAL OR OCCUPATIONAL REPRESENTATION

**Criticism of Proportional Party Representation.**—While the system of proportional representation described above is, according to its advocates, distinctly superior to the system of majority representation, it is in the minds of many persons defective for the reason that it insures representation only to minorities which are organized as political parties. They argue as follows: proportional party representation does not take into account the existence of other large and important groups, economic, social, professional, occupational, and the like, which have special interests peculiar to each and which therefore ought to be specially represented in the legislature. Neither the system of representation of political majorities nor that of political minorities as such is in harmony with modern conditions or the true principle of representation. Both are defective because they rest upon purely geographical and political bases. They should therefore be replaced by a system of professional, class, occupational, or functional representation which would disregard political and territorial lines since the latter after all are largely artificial and do not mark off precisely the boundaries which separate the real interests of the various classes of which modern societies are composed.

**Early Forms of Class Representation.**—To a certain extent the system proposed would mark a return to the original system under which each of the principal classes of society—the nobility, the clergy, and the commons (and in Sweden the townspeople and the peasants until 1866)—had its own separate representation in the legislature.

Until 1907 the voters in Austria were arranged in five classes, the great landowners, the cities, the chambers of commerce, the rural communes, and a general class, each parliamentary constituency being composed wholly of one or another of these classes, never partly of one and partly of another. The parliamentary seats were so distributed among the five classes that eighty-five members were elected by the great landowners, one hundred and eighteen by the cities, twenty-one by the chambers of commerce, one hundred and twenty-nine by the rural communes, and seventy-two by the general class. But with a few important exceptions the system of class representation as applied to the constitution of lower chambers ultimately disappeared

with the advance of democracy, and class representation survives to-day only in the constitution of the upper chambers of a few European parliaments.<sup>48</sup>

**Advocates of the Representation of Interests.**—Nevertheless there have always been advocates of a system of representation based upon classes, professions, occupations, vocations, or other groupings of society, on the ground that it is most in harmony with the true spirit of democracy and the true conception of representation than a system based on territorial divisions or even upon purely political groupings. Mirabeau at the time of the French Revolution declared that a legislative assembly ought to be a sort of reduced mirror of all the varied interests of society somewhat as a topographical map reveals the configurations of the land. Sieyés, at the time, likewise expressed the view that the great industries of society should be specially represented in the legislature.<sup>49</sup> In fact, the principle of representation of interests found expression in the French *Acte Additionnel* of 1815,

<sup>48</sup> The Austrian House of Lords contained a certain number of members who represented the landowners of the empire, a certain number who represented the church, and a certain number who had distinguished themselves in the fields of science and art. The same was true to a less extent of the Hungarian Table of Magnates. The Italian Senate prior to the present régime contained certain representatives of the army and navy, representatives of the largest taxpayers and hence of the wealth of the kingdom and representatives of the Royal Academy of Science. The Spanish Senate prior to 1931 was composed of one hundred and eighty members, of whom thirty were chosen as follows: one member by the clergy of each of the nine archbishoprics; one by each of the six royal academies; one by each of the ten universities; five by the economic societies of the Friends of the Country. The remaining one hundred and fifty were chosen by electoral colleges composed of members of the provincial deputations and of representatives chosen from among the municipal councilors and largest taxpayers of the towns. This chamber more nearly than any other represented the various interests of the state rather than the population or political divisions. The Rumanian Senate contains a certain number of members elected by the chambers of commerce, of industry and labor, and of agriculture. A trace of the idea is found in the British practice which allows the various universities of the United Kingdom to elect 15 members of the House of Commons. By the Act of 1918 the electorate for these seats embraces all persons who hold a degree from the university electing a member or members. In Ireland each university is allowed to choose two members of the Senate and in Rumania the professors of each university elect one senator. The Hungarian House of Lords as reformed in 1926 is composed of two hundred and forty members of six different categories, some appointive, some elective.

<sup>49</sup> Quoted by Esmein, *op. cit.*, p. 257.

Art. 33 of which declared that alongside the deputies chosen by the ordinary electoral colleges, industry and commerce should have "special representation." Lord Brougham in his work on the British constitution affirmed it to be a principle which ought to govern in the distribution of representation, that every class and interest in the community should be represented. "Suppose," he said, "there were one important branch of trade confined to a single district and the number of inhabitants in that district did not warrant its returning a deputy with a view to population; still it should be represented with a view to the trade driven by it. So, important professions should be represented, and important classes of properties." The English system, continued Lord Brougham, "sins grievously against this canon, since it recognizes but one test, the ancient distribution of men into towns."<sup>50</sup> In more recent times the principle of professional or class representation, or representation of interests as contradistinguished from representation of numbers, found an increasing number of advocates. Among them may be mentioned Duguit,<sup>51</sup> Prins,<sup>52</sup> De Greef,<sup>53</sup> Charles Benoist,<sup>54</sup> La Grasserie,<sup>55</sup> the Austrian publicist Albert Schäffle, and the Greek scholar Saripolos, the author of an exhaustive study of the subject of proportional representation.<sup>56</sup> Duguit maintains that the expression of the general will (*volonté générale*) can be effectually secured only through the representation of the various groups whose opinions go to make up the general will. No legislature, he affirms, is therefore truly representative of the country.

<sup>50</sup> "Works," vol XI, pp. 74, 95. The German publicist Von Mohl suggested that society should be classified as landowners, agriculturists, merchants, shippers, and manufacturers, and each class given representation in proportion, first to its numerical strength, and second to its importance in the state. Religious and political organizations as well as labor organizations, associations of manufacturers, employers' associations, etc., should be allowed to choose their own representatives.

<sup>51</sup> In his "Manuel de droit constitutionnel," sec. 57 (1907). See also his "Traité de droit const." (ed. 1911), vol. I, pp. 378 ff., and ed. 1921, vol. II, pp. 51 ff., and his article "La représentation syndicale au parlement," *Rev. pol. et parl.*, July, 1911.

<sup>52</sup> "La démocratie et le régime représentatif" (1889).

<sup>53</sup> "La constituante et le régime représentatif" (1892).

<sup>54</sup> "Les sophismes politiques de ce temps" (1893), also his "Organisation du suffrage universel" (1896), and his "Report of the Committee of Universal Suffrage," made to the French Chamber of Deputies in 1905 ("Jour off. Des Parlem."), 1919.

<sup>55</sup> *Rev. pol. et parl.*, vol. III, p. 253.

<sup>56</sup> "La démocratie et l'élection proportionnelle," 2 vols. (1889).

unless it represents the two great constituent elements of the state : individuals and groups of individuals. "All the great forces of the national life," Duguit continues, "ought to be represented,—industry, property, commerce, manufacturing, professions, and even science and religion."<sup>57</sup> The system of professional representation, he argues, can be defended on the same ground as proportional representation for political parties ; in the one case it is representation of groups politically organized ; in the other, representation of groups differentiated for social or economic purposes.<sup>58</sup> Another French writer who advocates the system is M. Leroy, the author of various treatises on the subject.<sup>59</sup> Among English writers to-day who advocate the system in some form or other may be mentioned Mr. G. D. H. Cole, and various other Guild Socialists.<sup>60</sup> In the United States, advocates of the principle are not lacking.<sup>61</sup>

<sup>57</sup> "Droit constitutionnel," pp. 368-371.

<sup>58</sup> *Ibid.*, p. 359. See also on this point Benoist, *op. cit.*, pp. 250 ff., where a unique project for a system of proportional representation in France combined with a scheme of functional representation is fully discussed. Commons, in his work on "Proportional Representation," advocates the principle of the representation of interests. With regard to the interests of labor, for example, he asserts that if the labour unions could combine throughout the nation and elect members of Congress who would represent them as a body, just as they select the officials of their own organizations, their interests would be more effectually cared for by the national lawmakers. "As it is," he continues, "they are forced into artificial territorial divisions and are compelled along with the whole of the electorate to submit to the candidates who appeal to the more ignorant, thoughtless, prejudiced, and easily influenced masses."

<sup>59</sup> "Pour gouverner" (1918) and "Les techniques nouvelles du syndicalisme" (1921).

<sup>60</sup> See especially Cole, "Social Theory" (1920), ch. 8, and "Guild Socialism Restated" (1921). See also Wallas, "The Great Society" (1916).

<sup>61</sup> Compare William MacDonald ("A New Constitution for a New America," 1921, p. 133), who says, "It seems clear that if the United States is to have in Congress a truly representative national legislature, the existing system of representation must be changed so as to admit of the representation, not only of the population, as now, but also of recognized occupations or professions"; and Professor H. A. Overstreet ("The Government of Tomorrow," in the *Forum* for July, 1915, pp. 7 ff.), who, describing the territorial basis as one which "is now in large measure artificial and ineffective" for the reason that community of interest is now determined fundamentally by specific vocation, observes that : "A physician living in the eleventh precinct has far more community of interest with a physician living in the fifth precinct than he has with the broker who lives around the corner. Indeed, if one were to trace the lines of interest-demarcation in a great city, one would find them here, there, and everywhere, crossing and recrossing all the conventional political boundaries. If one seeks,

**Examples of Representation of Interests.**—Very recently the movement in favor of the system of professional or class representation has achieved some partial successes in several European states. As already pointed out in a previous chapter, the geographical or territorial system of representation has been replaced in Soviet Russia by a system based on the vocational principle for the All-Russian Congress; that is, one in which miners, iron workers, farmers, professional men, and other classes choose their own representatives without regard to territorial lines. The example of Russia has to some extent been recently followed in Italy, where the Senate has been reorganized upon the proposal of Mussolini. The Italian Senate formerly rested entirely upon the basis of appointment by the king (which in practice meant appointment by the ministry) but appointments were restricted to certain categories of persons, among them the largest taxpayers of the kingdom. As "reformed" by Mussolini it will be composed of representatives of various trades and professions, of employees, and trade unions (syndicates) recognized by the Fascisti government. The appointed senators now holding will not be displaced, but ultimately the chamber will be an elected body composed of senators chosen by the corporations of the various associations which will be represented.<sup>62</sup> The reformed Italian Chamber of Deputies also represents various cultural, social, and industrial organizations and corporations. The new German constitution of 1919 (Art. 165) introduces a unique innovation upon the existing system by creating a national economic council, representing the special interests of labor, capital, and consumers, which contains the elements of a third legislative chamber. As constituted by a law of 1920 it is composed of 326 members, 68 of whom are representatives of the agricultural and forestry interests, 68 of industry generally, 44 of commerce, banking,

in short, the natural groupings in our modern world, one finds them in the association of teachers, of merchants, of manufacturers, of physicians, of artisans. The trade union, the chamber of commerce, the medical association, the bar association, the housewives' league—these even in their half-formed state are the forerunners of the true political units of the modern state." See also Barine, "Sociology and Political Theory," pp. 107 ff.; Beard, "The Economic Basis of Politics," p. 46, and Professor W. S. Carpenter ("Democracy and Representation"), who advocates the abolition of the United States Senate and the substitution in its place of a chamber based on social and economic interests.

<sup>62</sup> Ellery, "Third Anniversary of the Fascist Revolution," *Current History*, Dec., 1925, pp. 430 ff.

and insurance, 30 of the consumer's element, etc. All together, nine groups of industries, businesses, professions, and occupations are represented on the council, and these include the body of civil servants and the government, which latter is represented by 24 members.<sup>63</sup> The council does not possess the power of legislation, but the constitution requires that all drafts of important laws relating to social and economic matters shall, before being introduced into the parliament, be submitted by the cabinet to the council for its opinion. It is empowered also to present, through its own members, its bills directly to parliament for its consideration. It is therefore merely an initiating and advisory body to the cabinet and the Reichstag. Composed as it is of the representatives of the important classes and interests of society who are experts in their respective fields, such a body under favorable conditions should be capable of furnishing the legislature with expert advice and of keeping it informed of the legislative needs of the various interests which it represents. The institution is still in the experimental stage and it is too early to pass judgment upon

incrits. Its workings up to the present time are said to have been characterized by lack of harmony among its members and by a certain indifference of the Reichstag toward its recommendations. The council has been criticized in Germany on the ground that it is too large and unwieldy to serve as an effective consultative body, and it has been proposed to reduce the number of members to about two hundred.<sup>64</sup>

In several other states advisory economic councils have been instituted or provided for by the constitution. Thus the constitutions of the new states of Yugoslavia, Poland, and Danzig all provide for the establishment of such councils to collaborate with the legislature in the formulation of projects of legislation in respect to economic

<sup>63</sup> Good brief discussions of the council may be found in McBain and Rogers, "New Constitutions of Europe" (1922), pp. 149 ff., and in Von Siemens, "Germany's Business Parliament," *Current History* for Sept., 1924, pp. 994 ff.

<sup>64</sup> The origin, nature, and working of the council are fully described by Professor Finer in his book, "Representative Government and a Parliament of Industry: A Study of the German Labor and Economic Council" (1923). Professor Finer's conclusion is that the council "has proved its worth and its right to exist" (p. 181). Professor Bonn remarks that it "has done a lot of lengthy debating but has not brought about any important change in evolving schemes or methods of dealing with economic and social problems." "The Crisis of European Democracy" (1925), p. 75.

and social problems,<sup>65</sup> and somewhat similar councils have been established in Italy, Spain, and Portugal. In France, where technical councils have long been in existence for giving advice in respect to administrative matters, in 1925, following a campaign by the general confederation of labor, a council on legislation somewhat similar to that of Germany was set up by decree. It is a small body, compared with the German council, consisting of only forty-seven members representing the consumers, the laboring classes, education employers, artisans, capital, real estate, banking, etc. Five of the ministries of the government are also represented, each by two members. Like the German council, it has merely advisory functions. It has a right to be heard by the committees of parliament and by the ministers in respect to legislation or administrative action which it advocates. The cabinet, on its part, is required to lay before the council for its information all bills of an economic character which it presents to parliament. The council may make recommendations in regard to these measures and the prime minister is required to report to the council within a month what action the cabinet has taken thereon.<sup>66</sup>

**Criticism of the Principle of Representation of Interests.**—The principle of the representation of interests has been criticized by many writers. The late Professor Esmein stigmatized it as "an illusion and a false principle which would lead to struggles, confusion, and even anarchy." In the first place, he said, it was inconsistent with the principle of national sovereignty, which is based upon the theory that members of legislative assemblies are chosen to represent the interests of the nation as a whole and not the special interests of particular classes.<sup>67</sup> The very *raison d'être* of free representative

<sup>65</sup> Const. of Yugoslavia, Art. 44; Const. of Poland, Art. 68; Const. of Danzig, Arts. 45, 114.

<sup>66</sup> The history and organization of the council are discussed in detail by Miss Bramhall in a note entitled "The National Economic Council of France," *Amer. Pol. Sci. Rev.*, vol. XX (1926), pp. 623 ff. See also Scelle, *Rev. Pol. et Parl.*, Oct. 1924. In England recently a number of advisory or consultative councils have been set up to advise certain government offices or departments, but not the legislature. See Fairlie, *Amer. Pol. Sci. Rev.*, Nov. 1926, pp. 812 ff.

<sup>67</sup> But Duguit ("Droit const.", 1911, vol. I, p. 379) maintains the contrary view. Carré de Malberg ("Théorie générale de l'état," vol. II, p. 367) appears to agree with Esmein. Benoist ("Organisation du suffrage universel," 1897, pp. 30-31) is ready to admit that the principle of representation of interests may violate the doctrine of national sovereignty, but he is willing to sacrifice the latter for the former.

government, he continued, is the supposition that the vote of the citizens and their representatives will ascertain the general interest and make it pass into legislation. But in order that this may be accomplished it is necessary that both disregard, as far as possible, their particular interests and allow themselves to be guided by reason and justice. The system of professional or vocational representation, he went on to say, would invite the citizens, almost force them, in effect, to consider first of all their particular interests and forget the general interests. It would promote a struggle between different interests and forces, accentuate the feeling of antagonism between them, and undermine the sound doctrine that a man's interest in the welfare of the group, class, or profession to which he belongs should be secondary to his interest in the welfare of the whole society.<sup>68</sup> Esméain, however, recognizes that it is useful and desirable that the great economic interests and professional groups should be allowed to make known to the government their views through organs which they have themselves elected to represent them, that is, such organs should be formed and endowed with *consultative* but not legislative powers.

To most persons the idea of class representation is fundamentally unsound in principle because it is based on the very doubtful assumption that no deputy can represent adequately a constituency which is not composed exclusively of persons of his own class; that a lawyer, for example, cannot truly represent the interests of farmers, miners, or merchants, and that a legislative assembly, in order to be really representative, must be a composite body made up of delegates chosen by the various heterogeneous groups, economic, vocational, professional, and otherwise, of which modern societies are composed. Such a system, we fear, would tend to circumscribe the horizon of representatives and lower the character of legislative assemblies, since each member would in large measure regard himself as the exclusive representative of the particular opinions or interests of the group which elected him, rather than as the representative of the general interests of the state as a whole.<sup>69</sup> Professor Barthélémy points out also that it is an illusion to

<sup>68</sup> "Droit const." (5th ed.), pp. 256-259.

<sup>69</sup> Compare Sidgwick, "Elements of Politics," p. 395; Bluntschli, "Politik," pp. 447-456, and Munro, "The Governments of Europe," p. 737. Professor Laski (*op. cit.*, pp. 80 ff.) strongly defends the principle of representation of interests, though he criticizes the form which the guild socialists would give it and also the form in which it has been introduced in Germany.

suppose that voters grouped according to their professions or occupations would always vote "technically," that is, solidly as a group; on the contrary, many of them would disregard the professional or occupational lines which separate them and continue to vote with the political party to which they belong.<sup>70</sup> Finally, there is the practical difficulty of how to apportion equitably the representatives among the various professions and classes. According to Sidney Webb there are 750,000 textile workers in England, 40,000 physicians, and 6000 architects.<sup>71</sup> On what principle could the interests of three such widely different groups be proportionately represented in the legislature, except on the basis of numbers?<sup>72</sup>

A legislative assembly composed of so many elements would tend to become a debating society instead of a lawmaking body, and its efficiency would be diminished in proportion to the number and variety of interests represented. One of the sources of strength in the governments of Anglo-Saxon countries has been the freedom of their legislative assemblies from the presence of numerous unstable and dissolving groups with their inevitable dissensions and conflicting interests.<sup>73</sup> Finally, the organization of the electorate upon the basis of class distinctions, whether economic, social, or professional, would inevitably tend to multiply artificial distinctions, encourage further division of the population into groups, array each against the others, and accentuate class antagonism generally.<sup>74</sup>

<sup>70</sup> "Le problème de la compétence dans la démocratie," p. 45.

<sup>71</sup> "History of Trade Unionism" (1920).

<sup>72</sup> Compare Sharp, *op. cit.*, p. 121.

<sup>73</sup> "Imagine a legislature," says Bradford ("Lessons of Popular Government," vol. II, p. 170), "made up of distinct groups of Republicans, Democrats, Socialists, woman suffragists, labor men, prohibitionists, religious fanatics, all perfectly determined that nothing should be done unless their special objects were provided for. Would the lobbying and logrolling be any less than now, or would the strength of the groups be any less made use of by designing men?" Compare also Sidgwick's views of a legislature made up "total abstainers, anti-vivisectionists, anti-vaccinationists, and the like" ("Elements of Politics," p. 396).

<sup>74</sup> Advocates of the principle of representation of interests naturally deny the truth of these assertions. Selfishness and antagonism between groups exist already in a high degree, they maintain, and giving them representation in the legislature would not accentuate the antagonism but would tend to diminish it. Compare Burns, *op. cit.*, p. 107, and the article of Overstreet cited above.

### VIII. NATURE OF THE LEGISLATIVE MANDATE ; RÔLE OF THE REPRESENTATIVE

**Classification of Opinions.**—As to what is the proper function of a representative whom the people have chosen to act for them in matters of legislation, there is a wide difference of opinion. The views which have been expressed by writers on the subject or have been acted upon in practice may be grouped under three heads.

*First*, the representative is regarded as the delegate, deputy, or agent of the particular constituency which elects him, charged primarily with procuring legislation for the advancement of the local interests of his constituency, obtaining appropriations of money for the construction of public works therein, and securing other favors which lie within the power of the legislature or government to bestow.

*Second*, he may be regarded as the representative of the whole state, elected to consult with other representatives and charged primarily with the care and advancement of the general interests, and only secondarily with the promotion of the particular interests of his immediate constituency.

*Third*, he may be regarded as the mouthpiece or spokesman of the political party which is in the majority in the constituency from which he is elected and as such is bound by the will of his party, whatever may be his own personal views in regard to the expediency or wisdom of particular legislative policies. When that will has been clearly made known to him by resolutions or instructions, he is morally obliged to conform to it by his acts and votes. This is the doctrine of what the French call the *mandat impératif*, which reduces the representative to the rôle of a conduit pipe or telephone wire through which the views and commands of the party are communicated to the legislature. It is quite possible, of course, that the representative may combine the qualifications and perform the rôles required and imposed by the first and third theories; that is, he might act as the representative of his particular district and at the same time serve and obey his party in matters of national and local policy. But he could hardly at the same time play the rôle prescribed by the second theory, that is, act primarily as the representative of the general interests, if there were a conflict, apparent or real, between them and the local interests of

his constituency, for the reason that no agent can serve two principals when their instructions are in conflict.<sup>75</sup>

**The Early Conception.**—As pointed out in a previous chapter, the idea of the rôle of representative in the early stages of the development of the representative régime was that the deputy was the special agent of the class or estate, nobility, clergy, commons, peasantry, or town population which chose him, that he was subject to its instructions, that he was immediately accountable to it, and that he could be recalled by it at any time.<sup>76</sup> In short, his rôle was more nearly analogous to that of a diplomatic agent than to that of a modern representative, who, according to the generally prevailing view, possesses the full power of legislation, freedom of deliberation and of voting, and is not subject to instruction or recall.

**The Modern Conception.**—The old idea of the restricted nature of the legislative mandate, and especially the conception that its holder was the agent of his constituency rather than the representative of the nation as a whole, had largely disappeared in England before the seventeenth century,<sup>77</sup> although it did not disappear in France until the Revolution, when the states-general in their national assembly in 1789 declared themselves to be the representatives of the nation. The modern idea was embodied in constitutional law for the first time when it was expressly proclaimed in the French constitution of 1791<sup>78</sup> that the deputy should not be the representative of any particular circumscription (*département*) but of the entire nation, and that no instructions should be given him. The same principle was expressed in the German imperial constitution of 1871 (Art. 29); in the French organic law of Nov. 30, 1875 (Sec. 13); in the Austrian electoral law of 1867, and in the Swiss constitution of 1874 (Art. 91), which declared that members of the legislature should vote without instructions. Virtually all the new constitutions that have been put into effect in Europe since the World War proclaim the same principle. It is significant, however, that this view has not been specifically laid down in any of the American constitutions.

<sup>75</sup> Compare Bryce, "Modern Democracies," vol. II, p. 351.

<sup>76</sup> Compare Esmein, *op. cit.* (5th ed.), p. 262, where the opinion of Sieyès, in respect to the office of deputy in the states-general, is quoted.

<sup>77</sup> Compare Hallam, "Constitutional History," vol. I, p. 362.

<sup>78</sup> Title III, ch. 1, sec. 3.

**Views of Statesmen and Political Writers.**—Of the merits of the three views in respect to the nature of the legislative mandate mentioned above, opinions naturally differ, but there is little difference of opinion among statesmen and political writers. The view which regards the representative as being first of all the delegate of the particular district from which he is chosen and especially of the party which chooses him, is admitted by nearly all writers to be a vicious one. Such a view not only subordinates the national or general interests to the assumed interests of particular localities, but it tends to narrow the horizon of the representative and thereby lower the level of character of the legislature, tends to deter men of large ability from serving in it, and accentuates the control of the political party over its representatives.

A member of parliament, said Lord Brougham, "represents the people of the whole community, exercises his own judgment upon all measures, receives freely the communications of his constituents, and is not bound by their instructions, though liable to be dismissed by not being re-elected in case the difference of opinion between him and them is irreconcilable and important. The people's power being transferred to the representative body for a limited time, the people are bound not to exercise their influence so as to control the conduct of their representatives, as a body, on the several measures that come before them."<sup>79</sup> The same view of the office of the representative was expressed by Bluntschli. The modern representative, he declared, is a state representative, not the representative of any person, corporation, or group, and his duty is a state duty. He is not bound, Bluntschli added, by the instructions of his constituency not compelled to answer to them for his conduct. He is something more than a mere commissioner to register the mandates of his constituency and liable to be recalled in case he refuses to do so. On the contrary, he possesses full liberty of thought and action, and the right to interpret for himself the common need and the common consciousness without restraint upon his intellect or conscience.<sup>80</sup>

Esméin defined a representative as one who, within the limits of his constitutional powers, has been chosen to act freely and

<sup>79</sup> "The British Constitution," "Werks," vol. XI, p. 94.

<sup>80</sup> "Allgemeines Staatsrecht," pp. 54-55. See also Bornhak, "Allgemeine Staatslehre," pp. 94-114.

independently in the name of the people. He must have full independence of judgment and action in order to fulfill his mission, for if his acts are determined in advance for him by legal rules or obligatory instructions, he is not a representative but a mere delegate or *mandataire* of the electors. Not only, declared Esmein, has a constituency no right to recall a representative, but it cannot limit his powers by instructions or compel him to act in a certain manner upon pain of having his acts nullified. The *mandat impératif* is not only contrary to the principle of representative government, but is at least contrary to the principle of national sovereignty.<sup>81</sup> Another French jurist, Carré de Malberg, who has discussed at great length the rôle of the representative, criticizes vigorously the doctrine of the *mandat impératif*. The theory, he says, is based on the idea that there exists a contractual relation between the representative and the electors analogous to that which results from the notion of civil mandate in the private law of contract—that the representative exercises his power in virtue of a delegation or commission which has been given to him by the electors as *mandants*—an idea which originated with Rousseau but which is “vitiated by a manifest contradiction.” The theory is impossible, he says. If the representative is merely an agent (*mandataire*), he necessarily represents only the electoral body which chooses him and not the nation entire, because there can be no contractual relation between them and those who have not by their vote conferred upon him a mandate. Moreover, the notion of the *mandat impératif* implies that the deputy has only such powers as the mandatory has conferred upon him. Consequently the electors must be admitted to have the right to limit his powers at will at the moment of election; in other words, lay down a program for him, trace the

<sup>81</sup> “Droit constitutionnel” (5th ed.), especially pp. 263, 386. Compare also Lieber, who observed that the “true character of representative government does not admit of mandatory instructions to the representative, for it makes of him a mere deputy who ought to have his instructions from the beginning.” “Political Ethics,” vol. II, pp. 325-330. But Rousseau maintained the doctrine that the deputy is merely a *mandataire* of the electors and that they have an imprescriptible right to recall him. “Social Contract,” bk. III, ch. 15. Robespierre, in the French convention of 1793, asserted the same doctrine. A people, he said, whose deputies cannot in this way be held accountable for their acts really have no constitution. Quoted by Esmein, *op. cit.*, p. 386.

line of conduct which he must follow, and impose upon him obligations and give him orders.<sup>82</sup>

Edmund Burke expressed the conservative view of the office of the representative—the view which is still defended by most writers, even though it does not represent the extreme current democratic conception—when he said the representative owed his constituency both industry and judgment, and when he sacrificed these to the opinion of the constituent, he betrayed rather than served him. “The representative, he declared, “should be a pillar of state, not a weathercock on the top of the edifice exalted for his levity and versatility and of no use but to indicate the shiftings of every fashionable gale.”<sup>83</sup>

<sup>82</sup> *Op. cit.*, vol. II, pp. 209 ff. For another French criticism of the principle of the *mandat impératif* see St. Girons, “La séparation des pouvoirs,” pp. 162-165. By his vote, observes St. Girons, the elector transfers to the representative all the power he possesses and cannot therefore share with him the power of legislation. Every instruction, therefore, should be pronounced null and void either by the legislature or the judiciary, and a candidate who promises to obey the orders or instructions of his constituency when they are contrary to the conclusions of his own judgment and conscience ought to be defeated. Duguit, however, appears to be a defender of the doctrine of the *mandat impératif*, which, he contends, is still the theory of French public law. But he maintains that the deputy does not receive his mandate from the electors of the circonscription from which he is chosen but from the nation entire of which he is the representative. He is not therefore obliged to take account of the will of the circonscription, and it has no right to instruct or bind him. The nation through its vote pronounced at the general parliamentary election confers upon the legislature as a whole its mandate and it is this mandate, rather than that of the local constituency, by which every deputy is bound. On various occasions deputies have been elected to the French parliament with mandates imposed by party committees which held in blank the resignations of the members to take effect upon demand of the committees. In all such cases the resignations were treated by the chamber as being null and of no effect. But proposals have been made in the French parliament from time to time for giving a legal character to such mandates. As to the cases and the whole subject of imperative mandates see Dandurand, “Le mandat impératif” (1896), and Briol, “Du mandat législatif,” 1905.

<sup>83</sup> See his address to the electors of Bristol, 1780, in which he defended his action in disregarding their instructions. “The parliament,” he declared, “is not a congress of ambassadors from different and hostile interests, which interests each must maintain as an agent and advocate against other agents and advocates. But parliament is a deliberative assembly of one nation, with one interest, that of the whole where not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole. You choose a member, indeed, but when you have chosen him, he is not a member of Bristol, but he is a member of parliament.”

**Should a Representative Be Bound by Instructions?**—Whether a member of the legislature should be bound by the instructions of his constituents, that is, whether his office should be restricted merely to ascertaining and registering their sentiments, somewhat like that of a delegate or an ambassador to a congress; or whether he should himself judge for his constituents what ought to be done and act according to his own convictions independently of instructions, are questions upon which men have differed ever since the principle of representation became an established fact. Although these questions, as John Stuart Mill observed, belong to the domain of political ethics rather than to political science or constitutional law, they have a direct bearing on the subject here under consideration and may well receive attention. In attempting to answer them we might well follow Francis Lieber's suggestion<sup>84</sup> that a distinction should be drawn between the position of the representative who is popularly elected and the representative who, like senators in some federal states, is chosen by legislative bodies or other political organizations, which, unlike an electoral body composed of the whole mass of citizens, has a tangible juridical existence and is therefore capable of declaring formally its will and of giving instructions. In the United States, senators were for a long time elected by the state legislatures and there was and still is a disposition in some minds to regard them somewhat as ambassadors accredited by the states to the national government. In these circumstances an argument might be advanced in favor of the right of the legislature to instruct them as to how they shall vote.<sup>85</sup>

<sup>84</sup> "Political Ethics," vol. II, p. 307. Carré de Malberg, *op. cit.*, vol. II, p. 213, recognizes the value of this distinction. As is well known, the delegates to the Bundesrat under the German constitution of 1871 were subject to instructions by the governments which appointed them very much as diplomatic representatives are.

<sup>85</sup> Prior to 1913, when United States senators were chosen by the state legislatures, the right of instruction (by the legislature) was sometimes asserted and exercised. Sometimes the instructions were obeyed, sometimes disregarded. The legislature of Virginia in 1836 "instructed" the senators from that state to vote for the expunging resolution then before the United States Senate. The instructions were disobeyed by both Senators Benjamin Watkins Leigh and John Tyler. Leigh resigned, but Tyler retained his seat, regarding the instructions as contrary to the constitution. In 1878 the legislature of Mississippi instructed its senators to vote for the Bland Silver Bill. The instructions were disobeyed by Senator Lamar, who defended his action in a strong address to the people of the state. See Mayes, "Life of L. Q. C. Lamar," p. 234. Now that senators are chosen

**The Affirmative View.**—With regard to the duty of the representative who is chosen directly by the people, it is widely asserted to-day that, in order to be what the word implies, namely, the mouthpiece of those for whom he speaks, he ought simply to register their will rather than his own whenever it is known to him in unmistakable terms or he ought to resign and make way for some one who more truly represents their sentiments. Otherwise how can he be said to be a representative of the people and how can he speak for them as they themselves would speak if they could be in his place?

**The Negative View.**—But those who adopt this view ignore the practical difficulties in the way of its full realization. The will of the people cannot always be ascertained and made known to the representative, for there are rarely any organs for collecting their sentiments on the multifarious questions that are presented to the legislature for consideration. It can hardly be assumed that the opinion of the local party committee in his district—the only organized body capable of formulating instructions—is the opinion of the electorate. Public opinion, indeed, can only be ascertained by the sifting process of a representative system. What is often taken for public opinion is in fact but the momentary impulse of excited masses and not the calm judgment of the people.

Where, however, the representative has pledged himself before the election to act in a certain manner, the question of his duty to obey instructions is somewhat simplified, for then a departure therefrom would be a breach of honor and of good faith such as no representative can afford to be guilty of. It is a grave question of public

by popular vote probably no state legislature would assume to instruct them although it might adopt resolutions "requesting" them to vote in favor of or against certain proposed legislation. Cases of such requests have not been lacking. Burgess (*op. cit.*, vol. II, p. 50) denies the right of instruction as applied to both senators and representatives. "The principle is," he said, "that each senator and each representative represents the whole United States, according to his own intelligence and judgment, and that there is no constituency in the United States which can demand a control over its representative in either house of the Congress or require his resignation." Lieber ("Political Ethics," vol. II, p. 361) also pronounced the doctrine of instruction to be "unwarranted, inconsistent, and unconstitutional."

policy, however, whether a constituency should make it a condition of election that a candidate should adhere to certain opinions laid down for him by themselves.<sup>86</sup>

Lord Bryce, who raised the question as to whether democratic theory really requires a representative to give a pledge which his own judgment condemns, pointed out that conditions which existed at the time of his election may change before the expiration of his term and the pledges which he made before the election he never would have made had he foreseen the change of conditions.<sup>87</sup> Moreover, has he no right to profit from what he learns from debate in the legislature and from the other sources of information which were not available to him when he gave his pledge?

One may well hold that the representative should possess full independence of judgment and action, unfettered by instructions, without, however, taking the impossible position that the opinions of the electors are to be lightly ignored, or that the representative is in no sense bound by the understandings under which he was elected. Clearly, as Laski remarks, he is not entitled to get elected as a free trader and to vote at once for a protective tariff. The representative who endeavors faithfully to reflect the will of his constituency will not recklessly disregard their sentiments, but will, so far as is consistent with his best judgment and sense of duty to the nation, give effect to them. Even Burke admitted that it "ought to be the happiness and

<sup>86</sup> Regarding ante election pledges, John Stuart Mill expressed an unfavorable opinion. Pledges should not be required, he said, "unless from unfavorable social circumstances or faulty institutions, the electors are so narrowed in their choice as to be compelled to fix it on a person presumptively under the influence of partialities hostile to their interest." "Representative Government," pp. 227-228. On the subject of pledges see also Lieber, "Political Ethics," vol. II, bk. VI, ch. 3. Lord Brougham stated that pledges were common in Great Britain in former times, though occasionally candidates refused to make promises, as did Macaulay, in 1832, when he declared to a political committee that he would give no pledges under any circumstances.

<sup>87</sup> "Modern Democracies," vol. II, p. 352. Lord Bryce (*ibid.*, p. 353) expressed the following opinion in respect to the circumstances under which a representative is morally bound to resign: "One thing is clear. If a representative so dislikes the policy of his own party as to wish to cross over to the other, his duty is to resign his seat forthwith. This is now the rule in Great Britain. So, too, if his opinions have so changed as regards one important measure that, having been elected to advocate it, he can do so no longer, he must resign."

glory of a representative to live in the strictest union, the clearest correspondence, and the most unreserved communication with his constituents" and that "their wishes ought to have great weight with him and their opinions high respect."

Burgess says, rightly, that the *views* of a constituency should always be taken into account as contributing to the make-up of the consciousness of the state, but that the *will* of a constituency has no place in the modern system of legislative representation.<sup>88</sup> The essence of representation, as Lord Brougham once said, is that the power of the people should be parted with and given over for a limited period to the deputy chosen by them, and that he should perform that part in the government which, if it were not for this transfer of authority, would be performed by the people themselves. But it is not representation if the constituents so far retain control over their representative as to act for themselves. They may communicate with him; inform him of their wishes, opinions, and circumstances; pronounce their judgments upon his public conduct; they may even call upon him to follow their instructions and warn him that if he disobeys they will no longer trust him or reelect him to represent them. But he is to act—not they.<sup>89</sup>

### **The Representative Should Be Allowed Freedom of Judgment.**

—The representative under normal conditions will be a wiser person than the average of those whom he represents; he will possess the advantage of experience in statecraft, and probably superior

<sup>88</sup> "Political Science and Constitutional Law," vol. II, p. 116. Compare also the following from President Butler of Columbia University: "A real representative of the people is not their unreflecting mouthpiece or their truckling servant, bering his course to meet each shifting breeze opinion or puff of passion; he is rather the spokesman for their conscience and their insight and their judgment, and his own deepest and sincerest convictions reveal them to him." "True and False Democracy," p. 17. Dr. Butler maintains that in the United States the destruction of the fundamental principles of representative government began when "under the lash of party we reduced the representative to the position of a mere delegate; when we began, as is now quite commonly the case, to instruct a representative as to what he is to do when elected; when we began to pledge him in advance of his election that, if chosen, he will do certain things and oppose others." "Why Should We Change Our Form of Government," p. 18. Compare also Taft ("Popular Government," p. 24), who approves Burke's theory, and Laski (*op. cit.*, p. 319), who says Burke's explanation of the relation between the representative and the electors is as true to-day as it was when Burke gave it.

<sup>89</sup> "The British Constitution," "Works," vol. XI, pp. 35-37.

knowledge and ability ; and his own judgment, therefore, ought to be regarded with respect by his constituents.<sup>90</sup> The representative system is founded on the assumption that representatives will be elected who are more familiar with public affairs and better qualified to look after them than is the average elector ; in these circumstances what the electors have to do, as Sidgwick well remarked, is to choose such men and not to teach them the business of Government.<sup>91</sup> He ought not to be obliged to conform his action to their opinions or to vote in a manner which his own judgment, aided by discussion and argument, fully condemns. It is seldom the case, observes an able writer on this subject, that the people are capable of judging wisely in matters of legislation; they may express intelligent opinions on the larger questions of public policy, but rarely on matters of detail.<sup>92</sup> It follows that the electors will not do wisely if they insist on absolute conformity to their opinions.<sup>93</sup>

But, as Mill observed, democracy is not favorable to the reverential spirit. In modern democratic states the opinion prevails among the masses that they are as well qualified to judge of the common needs as those whom they have chosen to speak for them. There is, in short,

<sup>90</sup> "The great beauty of the representative system," said Mr. Macaulay, speaking in 1832, "is that it unites the advantages of popular control with the advantage arising from a division of labor ; just as a physician understands medicine better than an ordinary man . . . just as a shoemaker makes shoes better than any ordinary man, a person whose life is passed in transacting affairs of state becomes a better statesman than an ordinary man. . . . My opinion is that electors ought at first to choose cautiously, then to confide liberally ; and when the term for which they have selected their member has expired, to review his conduct equitably and to pronounce on the whole when together."

<sup>91</sup> "Elements of Politics," p. 558. Compare in the same sense Taft, "Popular Government," p. 29.

<sup>92</sup> St. Girons, "La séparation des pouvoirs," p. 163.

<sup>93</sup> Compare Mill, "Representative Government," ch. 12. "When the difference between the judgment of the electors and the representative is not fundamental, the elector may well consider," said Mill, "that when an able man differs from him there is at least considerable chance of the elector being in the wrong ; and, even if otherwise, it is worth considering whether he may not give up his opinion for the sake of the inestimable advantage of having an able man to act for him in the many matters in which he himself is not qualified to form a judgment."

a tendency everywhere to-day to regard the office of representative in a very different light from that described above. His function, according to the current view, is not to interpret the common good as his conscience, his study, and his better judgment dictate, but to ascertain to the best of his ability what public opinion demands and give effect to it, whether his conscience and judgment approve it or not.

## CHAPTER XXII

### THE EXECUTIVE ORGAN

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## I. PRINCIPLES OF ORGANIZATION

**What the Executive Organ Embraces.**—The second great organ, department, or branch of government—the third, if we accept the view of some writers that the electorate is also an organ—is the executive. In a broad and collective sense the executive organ embraces the aggregate or totality of all the functionaries and agencies which are concerned with the execution of the will of the state as that will has been formulated and expressed in terms of law. In this sense the term embraces not only the supreme head of the government—the chief of state, as he is called on the continent of Europe (president, king, emperor)—but also the ministers and the whole mass of subordinate executive and administrative functionaries who constitute what in Great Britain and the United States is known as the "civil service." As thus understood it comprehends the entire governmental organization, with the exception of the legislative and the judiciary and possibly the diplomatic corps. Thus tax collectors, inspectors, commissioners, policemen, and perhaps officers of the army and navy are a part of the executive organization.

According to the partisans of the duality theory of governmental functions, discussed in a previous chapter, even the judges of the courts might properly be regarded as falling within the category of executive functionaries, since, according to this theory, their function of applying the laws is really an incident or phase of the general process of execution. Ordinarily, however, when we speak of the "executive" or the executive department we mean the chief magistrate together with his advisers and ministers, or, as in Switzerland, the board or council which performs the duties which in other countries are intrusted to a single person, or as in the states of the American union, the governor together

with the principal elective state officers who share with him the executive power.<sup>1</sup>

As pointed out in a preceding chapter some writers distinguish between the functions of execution and administration and consequently between the executive and administrative organs or branches of government.<sup>2</sup> Other writers, like Carré de Malberg,<sup>3</sup> while admitting the essential differences between the nature of the executive and of the administrative functions, do not recognize the existence of an administrative organ distinguishable from the executive organ, and it would seem, correctly so, since in fact there appears to be no government which is actually constituted with two such organs separate and distinct from each other.

**Unitary Character of the Executive Organ.**—The executive function differs essentially in its nature from the legislative function and consequently it must be organized on principles which are very different from those upon which the legislature is constituted. Necessarily, the legislative organ must be a more or less numerous body, that is, it must be an assembly composed of representatives elected at frequent intervals from the body of the people. Its peculiar function is to deliberate, consult upon the general needs of society, and lay down rules of conduct for the guidance of private individuals and public officials.<sup>4</sup> The function of the executive, however, is not primarily to deliberate, but to execute, enforce, and carry out the state will as expressed by the legislature and the constituent assembly and is interpreted by the courts. The prime requisites for efficiency in the discharge of such functions are, therefore, promptness of decision, singleness of purpose, and sometimes secrecy of procedure. It may be stated in general terms, said Judge Story, that that organization is best which will at once secure energy in the executive and safety to the people.<sup>5</sup> A single person or a very small body of persons is

<sup>1</sup> Thus in some of the states of the American union (e.g., Illinois) the governor is declared by the constitution to be the chief "executive," but the executive "department" includes the governor and the other elective state officers.

<sup>2</sup> For example Willoughby (W. F.), "The Government of Modern States," ch. 16 (entitled "The Administrative Branch").

<sup>3</sup> *Op. cit.*, vol. I, sec. 1, ch. 2 (entitled "La fonction administrative").

<sup>4</sup> Compare Sidgwick, "Elements of Politics," p. 413.

<sup>5</sup> "Commentaries," vol. II, sec. 1417. Compare also Woolsey, "Political Science," vol. II, p. 270; and Kent, "Commentaries," vol. I, lect. XIII, sec. 1.

therefore better fitted for the discharge of such duties than a numerous assembly composed of many minds and entertaining a variety of views. To organize the executive power by dividing it among a number of coördinate and equal authorities would necessarily lead to its enfeeblement, especially in times of crises when promptness of decision and action may be essential to the preservation of the life of the state.<sup>6</sup>

The testimony of political writers and statesmen has been practically unanimous in favor of the principle of unity in the organization of the executive office. No one more powerfully defended it than Alexander Hamilton. "Energy in the executive," he said, "is a leading characteristic in the definition of good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy."<sup>7</sup>

"The most distinguished statesmen," said Judge Story, "have uniformly maintained the doctrine that there ought to be a single executive and a numerous legislature. They have considered energy as the most necessary qualification of the executive power, and this is best attained by reposing it in a single hand."<sup>8</sup> Plurality in the organization of the executive also tends to conceal faults and destroy responsibility.<sup>9</sup> Responsibility under such an arrangement, observed Mill, is a mere name. What the "board" does, he went on to say, is the act of nobody and nobody can be made to answer for it. Where a number are responsible, the responsibility is easily shifted from one shoulder to another, and hence both the incentive in the executive and the advantages of the restraint of public opinion are lost.

**Examples of Plural Executives.**—Nevertheless history furnishes some examples of the plural form of executive, but most of them were short-lived. In ancient Athens the executive power was split up into fragments and divided among generals, archons, etc., each

<sup>6</sup> Compare Sidgwick, *op. cit.*, p. 410.

<sup>7</sup> *The Federalist*, No. 69.

<sup>8</sup> "Commentaries," secs. 1419, 1424. Cf. also Montesquieu, "*Esprit des lois*," bk. XI, ch. 6. Also John Stuart Mill, "Representative Government," ch. 14.

<sup>9</sup> De Lolme, "Constitution of England," bk. II, ch. 2.

being independent of the others. The Roman constitution for a long time provided for two consuls, each of whom was invested, not with a part of the executive power, but the whole of it, and each could effect veto the action of his colleague. Sparta, in early times, had two kings, and the principle of "plurality" was extended to the organization of subordinate offices.<sup>10</sup> France after the Revolution experimented with the plural form of executive under several different constitutions. That of 1795 vested the executive power in a Directory of five persons, but the results were unsatisfactory.<sup>11</sup>

At the present time, the executive in every sovereign state, with one exception, is organized on the single-headed principle.<sup>12</sup> The exception is found in the constitution of the Swiss republic, which vests the executive power in a council of seven persons. One of the seven bears the title and dignity of president of the Confederation and performs the ceremonial duties of the executive office, but in reality he is merely chairman of the council and has no more actual power than his colleagues. The practical working of the institution in Switzerland has been attended with less difficulty than the plural form elsewhere, mainly on account of certain habits and traditions of the Swiss people, and because the ground had already been prepared through local experience. For a long time the collegial form of executive had existed in the separate cantons, and hence when it was introduced into the

<sup>10</sup> Woolsey, "Political Science," vol. II, p. 269. "The experience of other nations," said Hamilton in *The Federalist* (No. 69), "will afford little instruction on this head. As far, however, as it teaches anything it teaches us not to be enamored of plurality in the executive. We have seen that the Achaeans on an experiment of two praetors were induced to abolish one. The Roman history records many instances of mischief to the republic from the dissensions between the consuls and between the military tribunes who were at times substituted for the consuls."

<sup>11</sup> Esmein, "Droit constitutionnel," 3d ed., p. 473. The Directory, observes St. Cirons, "was a sad government; it vacillated between feebleness and violence. The enfeeblement of the executive power led to the establishment of a turbulent and irresponsible assembly." Such an organization of the executive, he adds, is "the best school to inspire the people with love for a dictatorship." "La séparation des pouvoirs," p. 263.

<sup>12</sup> Esmein says that some Frenchmen desired to establish the collegial form of executive in 1871, contending that it offered the best guarantees against arbitrary power, since it would prove a more efficient check on the acts of a single ambitious and unscrupulous executive. "Droit constitutionnel," p. 472.

constitution of the Confederation, in 1848, the institution had passed the experimental stage.<sup>13</sup>

**Organization of the Executive Power in Parliamentary-Governed States.**—While Switzerland is the only independent state in which both the titular and the actual executive power is intrusted to a collegial body, it is important to bear in mind that in all countries where the cabinet or parliamentary system of government in its normal form is found, the executive power is actually exercised by a body of ministers. In short, if we disregard the titular executive (king or president) who is ordinarily a figurehead, they all have executive organs constituted on the collegial principle. It may also be remarked that in some of the German states, notably Prussia, Bavaria, Baden, and Würtemberg, titular executives have recently been done away with entirely and the executive power is vested in the ministers. In most of them the Landtag elects a minister-president, who occupies a position analogous to that of the president of the Swiss Confederation, and he chooses his colleagues. In Baden the Landtag elects all the ministers, so that the system is essentially the same as that of Switzerland. In the German national assembly of 1919, the Independent Socialists advocated a similar form of executive for the *Reich*.

Nearly everything Hamilton, Story, Mill, and the others said against plural executives would seem to apply equally to executive government by cabinets. But experience has not demonstrated the validity of their criticisms. The fact that this system of government has continued to spread throughout the world is evidence enough that government by a plural executive is not in practice attended by the

<sup>13</sup> Rüttimann, "Das nordamerikanische Bundesstaatsrecht verglichen mit den politischen Einrichtungen der Schweiz," vol. I, sec. 201; Lowell, "Government and Parties in Europe," vol. II, pp. 196-208; and Bryce, "Modern Democracies," vol. I, pp. 351 ff. Bryce remarks that "in its constitutional position and working the Federal Council has been deemed one of the conspicuous successes of the Swiss system, for it serves three great advantages, specially valuable in a country governed by the whole people." These are: a nonpartisan body which is able to influence the legislative assembly and adjust difficulties; it attracts and secures in the service of the nation the best administrative talent of the country; and it secures continuity of policy and permits traditions to be formed.

The character of the Swiss executive is fully discussed in Barthélemy, "Le rôle du pouvoir exécutif dans les républiques modernes," pp. 260 ff. Fazy, a Swiss writer ("Législation constitutionnelle," p. 119), expressed the Swiss conception when he said, "the unity of the executive power is dangerous for liberty; the long history of the South American states proves it."

evils which have been attributed to it by many writers. It may be remarked in passing that the plural type of executive is not uncommon in the organization of local governments. The commission form of municipal government which has been lately introduced in many parts of the United States is a conspicuous example. As already mentioned, the Swiss cantonal executives are all organized on the collegial principle.

**Advantages Claimed for the Plural Form of Executive.**—It has been argued in favor of the plural form of executive that it furnishes greater guarantees against the dangers of executive abuse and oppression and renders more difficult executive encroachments upon the sphere of the legislature and upon the liberties of the people in general. It was for this reason that the system was originally introduced into Switzerland and has been retained there until this day. It is mainly for this reason also that the executive is often subjected to the control of a council in those branches of administration which afford the largest temptations and opportunities for abuse of power.

An executive constituted on such a principle manifestly could not plan and execute a *coup d'état*, nor invade the spheres properly belonging to the other departments, with the same ease and readiness with which a single ambitious individual could, unrestrained by a council and unopposed by colleagues who shared with him responsibility.<sup>14</sup> Finally, it is contended by some that an executive organized on the plural principle, while perhaps lacking the advantages of unity and energy, yet is likely to possess a higher degree of ability and wisdom than can be found in any single person. The executive power, it is pointed out, involves much more than the mere ministerial function of executing the commands of the legislature; it often involves the formulation of constructive policies, as well as important powers of direction, requiring the exercise of wide discretion and judgment, duties that can be more wisely performed by a body of persons than by a single individual.

<sup>14</sup> Story, "Commentaries," vol. II, sec. 1417. Milton, in his "Ready and Easy Way to Establish a Free Commonwealth," held this opinion. Both Locke and Hume, mainly for the same reason, advocated the vesting of the executive power in small assemblies. Locke, "Fundamental Constitution for the Carolinas"; Hume, "Essays," vol. I, p. 526. For criticisms of the view, see Kent, "Commentaries," 12th ed., vol. I, p. 283; and Adams, "Defense of the American Constitutions," No. 54.

**Executive Councils.**—Sometimes, the unity of the executive power is in effect destroyed or impaired by vesting it ostensibly in one person, but really dividing it between him and a council to whose advice and control the chief executive is made subject. Thus in the early constitutions of the American states the executive in nearly every instance was subjected to the control, in a large degree, of such a council; and indeed in two states, namely, Pennsylvania and Vermont, the executive power was virtually vested in a board.<sup>15</sup>

A strong but unsuccessful effort was made in the convention which framed the constitution of the United States to associate an executive council with the President. In the old German Empire the Federal Council (Bundesrat) shared with the emperor an important part of the executive power, so much so, indeed, that some of the German writers treated the Federal Council as the real executive and the emperor as merely its agent.<sup>16</sup> In Great Britain, likewise, various acts of the executive, particularly those known as orders in council, require for their validity the approval of the Privy Council, although the approval is a mere form.<sup>17</sup> The president of the French Republic is required to consult the Council of State in many cases, especially in

<sup>15</sup> See W. C. Morey, "Revolutionary State Constitutions," in the *Annals of the American Academy of Political and Social Science*, vol. IV, p. 27; W. C. Webster, "State Constitutions of the Revolution," in the same periodical, vol. IX, p. 80; and Barthélemy "Le rôle du pouvoir exécutif dans les républiques modernes," pp. 58-62, and the literature there cited. "The idea of a council to the executive," said Hamilton, in *The Federalist*, No. 70, "which has so generally obtained in state constitutions has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be 'deep, solid, and ingenious,' that 'the executive power is more easily confined when it is one'; that it is far more safe should there be a single object for the jealousy and watchfulness of the people. . . . The Decemvirs of Rome, whose name denotes their number, were more to be dreaded in their usurpation than any one of them would have been. . . . A council to a magistrate who is himself responsible for what he does are generally nothing better than a clog upon his good intentions; are often the instruments and the accomplices of his bad, and are almost always a cloak to his faults."

<sup>16</sup> Cf. Zorn, "Staatsrecht," vol. I, p. 156; also Goodnow, "Comparative Administrative Law," vol. I, p. 116.

<sup>17</sup> Toold, "Parliamentary Government," vol. II, p. 80.

regard to issuing ordinances; but the French idea is so averse to the diffusion of responsibility that the executive is not compelled to act upon the advice which the Council may give him. There is a saying of the French that "to act is the function of one ; to deliberate, that of several"; and while the value of advice is fully recognized, they are unwilling to sacrifice the advantages of responsibility in order to establish a control over the executive.<sup>18</sup>

"The President of the United States," said De Tocqueville, "was made the sole representative of the executive powers of the Union, and care was taken not to render his decisions subordinate to the vote of a council—a dangerous measure which tends at the same time to clog the action of the government and to diminish its responsibility. The Senate has the right of annulling certain acts of the President: but it cannot compel him to take any steps, nor does it participate in the exercise of the executive power. . . . The Americans have not been able to counteract the tendency which legislative assemblies have to get possession of the government, but they have rendered this propensity less irresistible."<sup>19</sup>

No objection, it would seem, can be urged against the practice of associating a merely advisory council with the executive. Such an arrangement ought to bring strength and wisdom to the executive department. Mill justly observed that a man seldom judges right when he makes habitual use of no knowledge but his own or that of a single adviser. The work of administration is often complex and difficult and requires for its efficient performance highly technical and special knowledge, not only on the part of those who actually perform the service, but often on the part of the chief magistrate who directs the administration. Such knowledge he rarely possesses, hence the advantage of an advisory council composed in part of men who do possess it is clearly evident. But the ultimate decision in most cases ought to be with the executive, and the responsibility ought to rest upon him. It is easy, as Mill remarked, to give the effective power and the full responsibility to one, providing him when necessary with advisers, each of whom is responsible only for the opinion he gives.<sup>20</sup>

<sup>18</sup> Compare Goodnow, "Comparative Administrative Law," vol. I, pp. 86, 112.

<sup>19</sup> *Op. cit.*, vol. I, pp. 125-126.

<sup>20</sup> *Op. cit.*, p. 244.

## II. MODE OF CHOICE OF THE CHIEF EXECUTIVE

**Methods Followed.**—Four different methods of choosing the chief executive have been followed in practice : first, the hereditary principle ; second, direct election by the people ; third, indirect election by a body of intermediate electors, themselves either popularly elected or chosen by some branch of the government ; and, fourth, election by the legislature.

In all the monarchical states of Europe to-day the nominal or titular executive is hereditary in a particular family or dynasty, although, as pointed out in an earlier chapter, elective monarchs were not unknown in former times and it is still the legal theory that the British monarchy is elective. Before the rise of popular government this principle of selection was practically universal and it still survives in a large part of the world to-day, but is tolerated perhaps rather than preferred, being more the result of historical conditions than of deliberate creation. It is doubtful whether the principle is destined to be extended in the future either through the reorganization of existing states or the establishment of new ones.<sup>21</sup>

The value of a hereditary executive in the government of the state was well set forth by the English writers Bagehot and Todd.<sup>22</sup> Bagehot, in his defense of monarchy, declared that the masses have little respect or reverence for an executive which they assist every half-dozen years to create. A hereditary monarch, he argued, is a powerful means of attaching the masses to the government and of securing their loyalty and obedience. Among the advantages of the hereditary principle, says Burgess, that are manifest even to one surrounded by the prejudices of the New World are : first of all, a respect for

<sup>21</sup> "Looking at the subject from a purely scientific standpoint," says Burgess, "it seems to me that a democratic state may, without violence to its own principle, construct for itself a government in which the executive power will hold by hereditary right." Burgess admits, however, that it "is not the most natural tenure for the executive of a democratic state." "It implies the existence of unusual conditions and the observance of difficult requirements, such as the existence of a royal house whose foundation is far back of the revolution which changed the state from its monarchical or aristocratic to its democratic form, and that the reigning house has accommodated itself to the spirit of the revolution, and has retained its hold on the people." "Political Science and Constitutional Law," vol. II, p. 308.

<sup>22</sup> Bagehot, "The English Constitution," ch. 3; Todd, "Parliamentary Government," vol. I, ch. 4.

government and a readiness to obey the law which can in no other way be attained until the political society shall have reached a degree of perfection far beyond anything which at present exists anywhere in the world.<sup>23</sup>

But when all is said that can be said in favor of the hereditary principle as a mode of selecting the executive, the testimony of experience is against it. It can be looked upon only as a survival of a past age, and its ultimate disappearance will doubtless follow in the course of the political evolution of the future.

**Direct Popular Election.**—The choice of the executive by the direct vote of the people represents the opposite principle to that of the hereditary method. At the present time the national executives of a number of the South American republics, notably those of Bolivia, Chile, Mexico, Brazil, and Peru, are chosen by direct popular vote;<sup>24</sup> and this is true of the local state executives in the United States and of the local executives of all the Swiss cantons except Freiburg and Valais. In form, the method of electing the President of the United States is indirect, though, owing to a metamorphosis of the electoral system, the method has in fact come to be practically almost direct.

Of the new republics established in Europe since the close of the World War, only Germany provided for the system of direct popular election.<sup>25</sup> Under the constitution of 1848 the president of

<sup>23</sup> *Op. cit.*, vol. II, p. 309. "The great advantage of hereditary monarchies," said De Tocqueville, "is that as the private interest of a family is always intimately connected with the interests of the state, the executive government is never suspended for a single instant; and if the affairs of a monarchy are not better conducted than those of a republic, at least there is always some one to conduct them, well or ill, according to his capacity. In elective states, on the contrary, the wheels of government cease to act, as it were, of their own accord at the approach of an election and even for some time previous to the event." "Democracy in America," translation by Reeves, vol. I, p. 133.

<sup>24</sup> In the constituent assembly which framed the constitution of Brazil the mode of choosing the president was the subject of lengthy discussion especially as between the modes of direct popular election, indirect election, and election by congress. More than 600 proposals in all were made, and there is doubt whether the method of direct popular election, finally adopted, was really approved by a majority of the assembly. James, "Constitutional System of Brazil," pp. 84-85.

<sup>25</sup> During the debates in the Weimar assembly on the question of the mode of electing the president, the Social Democrats opposed the system of direct popular election on the ground that it was republican only in appearance; that

the French republic was elected by direct vote of the people, but the exploitation of this system by Napoleon III to convert the republic into an empire with himself as emperor wholly discredited the system in French eyes and it was abandoned in 1871. There is little public sentiment in France to-day in favor of a return to the method of popular election.

The advantages of the method of popular election are, that it is more distinctly in accord with modern notions of popular government, stimulates interest in public affairs, affords a means of political education for the masses, and secures the choice of a chief magistrate in whose ability and integrity the people have confidence and to whom he is theoretically at least (except in states which have the cabinet system) responsible for his official conduct.

The principal objections to direct popular election are : the incompetency of the masses in a country of vast area to judge wisely of the qualifications of a candidate for so important an office, their liability to be influenced by demagogues, and the general demoralization and the political excitement which are almost inseparable from a contest of such magnitude. "The election of a supreme magistrate for a whole nation," wrote Chancellor Kent, "affects so many interests and addresses itself so strongly to popular passions and holds out such powerful temptations to ambition that it necessarily becomes a strong trial to public virtue and even hazardous to the public tranquillity."<sup>29</sup>

Among the framers of the constitution of the United States only

in reality it was more monarchial than republican ; that a president chosen by the people would in all likelihood arrogate to himself the power of a dictator ; that it would open the way to the election of popular military leaders like Hindenburg and Ludendorff, etc. See as to this Brunet, "The New German Constitution" (1922), p. 156.

<sup>29</sup> "Commentaries," vol. I, pp. 274-275. Speaking of the mode of choosing the President of the United States, which at the time he wrote had become direct in substance, Kent declared : "If ever the tranquillity of this nation is to be disturbed and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the constitution : and if we shall be able, for half a century hereafter, to continue to elect the chief magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlightened part of mankind."

three or four favored direct popular election of the chief magistrate. Nearly all the delegates who expressed an opinion on the subject were full of profound distrust of such a method. Roger Sherman declared "that the people would never be sufficiently informed of the character of men to vote intellectually for the candidates that might be presented;" Charles C. Pinckney thought "the people would be incited by designing demagogues;" Gerry stigmatized the proposition as "radically vicious," Mason went so far as to say that "it would be as unnatural to refer the choice of a proper person for President to the people, as to refer a trial of colors to a blind man;" and Hamilton feared that it would "convulse the community with extraordinary and violent movements" and lead to "heats and ferments" that would disturb the public tranquillity.<sup>27</sup> Experience has shown, however, that the evils which the framers of the constitution predicted were greatly exaggerated, and, happily, their worst fears have not been realized. Nevertheless, it cannot be denied that some of these evils have not been entirely absent. The long period of business depression, the intense strain upon the public virtue, the heated political excitement, and the lavish expenditure of money on behalf of presidential candidates, which have come to be regular features of our quadrennial contests over the choice of the chief magistrate in the United States, have abundantly shown that the method of popular election is not in all respects ideal. One of its worst features is what Mill called "the mischief of intermittent electioneering." When the highest dignity in the state, he declared, is to be conferred by popular election once in every few years, the whole intervening time is spent in what is virtually a canvass. President, ministers, chiefs of parties, and their followers are all electioneers. The whole community is kept intent on the mere personality of politics, and every public question is discussed and decided with less reference to its merits than to its expected bearing on the presidential election. If a system had been devised, Mill went on to say, to make party spirit the ruling principle of action in all public affairs and create an inducement to make every question a party question, it would have been difficult to contrive any means better adapted to the purpose.<sup>28</sup>

<sup>27</sup> Dougherty, "The Electoral System of the United States," pp. 13-14; also *The Federalist*, No. 67.

<sup>28</sup> *Op. cit.*, p. 250. Cf. also Paley, a vigorous opponent of elective executives.

**Indirect Election.**—The method of indirect election is the system employed in choosing the national executives of the United States, Argentina, Spain (1931), and Finland (Constitution of 1919), although the elective scheme for choosing the President of the United States has, as has been said, come to be almost direct in fact. The advantages claimed for the indirect system are that it affords a means of avoiding the "heats," "tumults," and "convulsions" of direct election, and at the same time leads to a more intelligent choice, by restricting the immediate selection to a small body of capable representatives.

"The choice of several to form an intermediate body of electors," said Hamilton, in defense of the scheme adopted for the election of the President of the United States, and the metamorphosis of which

"Moral and Political Philosophy," p. 215. Professor Henry J. Ford, referring to the argument that popular election of the President is a valuable means of education worth much more than the enormous cost to the nation, remarked that this plea could be imposed only upon a people "so ignorant as to believe that politics and electioneering are the same thing. Instead of being a means of popular enlightenment upon political issues the effect of the presidential election is systematically to darken understanding of them. The statements of party aims which accompany party nominations are long, insincere rigmaroles, full of blaggart generalities without commitment on particulars. However, the place of such documents in the conduct of a presidential election is now confessedly one of minor importance. The main reliance is upon slogans, claptrap, personalities, and sentimental humbug, poured out in bewildering profusion, on the principle that the people can be made to believe anything that is hammered into their ears long enough. Even the possibility of carrying on an intelligent discussion of public policy is extinguished by the enthusiastic racket of the electioneering campaign. Such popular discussion of campaign issues as is in fact incited is mostly of the nature of gossip about the personal character and habits of candidates, and the politicians cater to such tastes by systematic calumny. Circumstantial stories about how a candidate has crazy spells, or tipplers on the sly, or ill treats his wife, or runs after women, are kept out of print for that would provoke exposure of falsity, but they are industriously circulated."

"So far from being an argument in favor of popular election of the chief magistrate, the effect it has," he adds, "upon the morality and intelligence of the people supplies a powerful argument against it. If Mill was right in holding that 'the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves,' then no condemnation can be too strong for the practice of choosing the chief executive by popular election, even if the process is reconcilable with public order, which in the long run it has never been found to be. The Swiss people have in nothing more shown the genuine quality of their democracy than by their rejection of proposals to make popular election the means of appointment to national executive offices."

was not then foreseen, "will be much less apt to convulse the community with any extraordinary and violent movements than the choice of one who was himself to be the final object of the public wishes." "It was desirable," he continued, "that the immediate election should be made by men most capable of analyzing the qualities adapted to the station. A small number of persons selected by their fellow-citizens from the general mass will be most likely to possess the information and discernment requisite to so complicated an investigation."<sup>29</sup>

In theory, the method of indirect election possesses conspicuous merits; but the difficulty lies in the fact that the electors are apt to be chosen under party pledges to vote for a particular candidate, and thus become mere agents for registering the will of the voters. This is almost inevitable in states where political parties are highly developed and well organized. This is exactly what happened in the United States as soon as party lines came to be fully drawn and party discipline became effective. In the early presidential elections the best results expected of the electoral scheme were fully realized, the electors exercising their full judgment in choosing the President; but in the course of time they became mere "party puppets," with no discretion or freedom in the discharge of what were originally intended to be solemn and important functions. Their duties now consist in registering the choice of the party voters—a function which an automaton without intelligence or volition could as fittingly discharge.<sup>30</sup> Thus what was intended to be a scheme of indirect election, in which the immediate choice of the chief executive was to be made by a select body of highly capable men, has in the course of a remarkable development become in reality a system of direct election by the millions.<sup>31</sup>

<sup>29</sup> *The Federalist*, Ford's ed., No. 68. See also Story, "Commentaries," sec. 1457. The theory of the electoral college, said the Senate Committee on Elections in 1874, was "that a body of men should be chosen for the express purpose of electing a President and Vice President who would be distinguished by their eminent ability, who would be independent of popular passion, who would not be influenced by tumult, passion, or intrigue, and who in the choice of the President would be left perfectly free to exercise their judgment in the selection of the proper person." Quoted by Dougherty in his "Electoral System of the United States," p. 16.

<sup>30</sup> Cf. Dougherty, *op. cit.*, p. 250; and Wilson, "Congressional Government," p. 250.

<sup>31</sup> Except, of course, that in the election each state votes by itself, choosing

who still go through the form of voting for electors whose real office has long since disappeared. Such was the scheme of which Hamilton did not hesitate to affirm "that if the manner of it be not perfect, it is at least excellent," and which was the only part of the constitution "that escaped without severe censure or which received the slightest mark of approbation from its opponents."<sup>32</sup>

**Election by the Legislature.**—Finally, the chief executive may be chosen by the legislative branch of the government. This method is followed in Switzerland; in France (where the two chambers organized in national assembly at Versailles constitute the electoral body for choosing the president of the republic);<sup>33</sup> in Czechoslovakia, Poland, Portugal, Venezuela, and China.<sup>34</sup> In Prussia, where there is no president of the republic, the minister-president is elected by the Landtag—the lower chamber of the legislature—and this system is in force in various other German states. This was the system employed for the election of the governor in a number of the American states for a time after the Revolution, and is still the method prescribed in several of them in case no candidate receives a majority of the popular vote. It was the method first decided upon by the Philadelphia convention of 1787 for the election of the President of the United States, but was finally abandoned upon reconsideration for the scheme mentioned above.

The main objection to choice by the legislature is that it violates the principle of the separation of governmental powers by imposing upon the legislative branch a duty alien to its primary function, and makes the executive to some extent an agent or instrument of the

electors on a general ticket. The result in a given state is the same whether the voters divide 51 per cent and 49 per cent, or 99 per cent and 1 per cent. It sometimes happens, therefore, that the successful candidate is not the choice of the majority of the voters in the entire country.

<sup>32</sup> *The Federalist*, No. 68. I have pointed out some of the anachronisms and dangers of the present method, in an article entitled "Shall the Electoral College Be Abolished?" *The Independent*, January 27, 1910. See also Allen, "Our Bungling Electoral System," *Amer. Pol. Sci. Review*, vol. XI (1917), 704 ff.

<sup>33</sup> The French vested the election of their president in the legislature because of their fear of an executive elected by and responsible to the people. They had had an unfortunate experience with an executive chosen by popular suffrage, and they sought to guard against the danger in the future by making the president elective by and responsible to the legislature organized in national assembly.

<sup>34</sup> The Chinese constitution (1923) says "by an electoral convention consisting of the members of parliament." It is therefore the same as the French method.

legislature.<sup>35</sup> If the executive owes his office to the legislature, "bargains," "intrigues," and "cabals" between him and it will not be wanting. "It would be in the power of an ambitious candidate," observed Judge Story, "by holding out the rewards of office, or other sources of patronage and honor, silently but irresistibly to influence a majority of votes; and thus by his own bold and unprincipled conduct to secure choice, to the exclusion of the highest and purest and most enlightened men in the country."<sup>36</sup> A similar opinion was entertained by Chancellor Kent, who remarked that "all elections by the representative body are peculiarly liable to produce combinations for sinister purposes."<sup>37</sup> Both reason and experience (for example in France, where the president has been reduced to a position of dependence upon the legislature and where he may be forced by it to resign his office) teach that election by the legislature not only impairs the independence of the executive and tends to make him subservient to its will, but creates a powerful temptation to an ambitious candidate to gain the support of the legislature by promises of official reward or influence. Once elected, he is under the same temptation to secure reelection. To be fully independent of legislative control and free of such temptation, the executive must derive his office from a different source.

Finally, it should be observed that the imposition of so important a political duty upon the legislature is likely to interfere with its normal function of lawmaking, by introducing a distracting element which on occasions of great and exciting contests must necessarily consume

<sup>35</sup> Compare Rawle, "On the Constitution," ch. 5, p. 58. Bryce thus states the reasons for the rejection by the Philadelphia convention of both the method of popular election and appointment by the legislature: "To have left the choice of the chief magistrate to a direct popular vote over the whole country would have raised a dangerous excitement and would have given too much encouragement to candidates of merely popular gifts. To have intrusted it to Congress would have not only subjected the executive to the legislature in violation of the principle which requires these departments to be kept distinct, but have tended to make it a creature of one particular faction instead of the choice of the nation." "American Commonwealth," ed. of 1910, vol. I, p. 40.

<sup>36</sup> "Commentaries," sec. 1456.

<sup>37</sup> "Commentaries," lect. XII, p. 279. Cf. also Woolsey ("Political Science," vol. II, p. 278), who remarks "that election by the legislature would be a source of great corruption. Men who had votes in their hands would bargain for places for themselves or their friends; a system of intrigue on a vast scale would be initiated which would have disastrous consequences—of intrigue not only between members of the legislature and agents of candidates, but of intrigue of politicians desirous of getting a place in the body which was to choose the chief magistrate."

its time, lead to conflicts and deadlocks, and give a party coloring to the consideration of many measures which are in reality nonpartisan in character.

The chief argument in favor of choice by the legislature is that the selection is likely to be more wisely made than when done by the masses of voters, or by a body of intermediate electors. Being actively concerned with public affairs and acquainted with the leading statesmen, the members of the legislative branch are of all persons most qualified to choose a fit man for so high a station. John Stuart Mill was an advocate of this method for the election of executives of republics, although he questioned whether it was the best for all times and places. "It seems better," he said, "that the chief magistrate in a republic should be appointed avowedly, as the chief minister in a constitutional monarchy is virtually, by the representative body. The party which has the majority in parliament would then as a rule appoint its own leader; who is always one of the foremost, and often the very foremost, person in political life."<sup>38</sup>

Whatever the merits and demerits of the system of election by the legislature, the present practice is distinctly in favor of it. Among republics, outside of America, it is now by far the most widely accepted mode of election. In France, where it has existed since 1871, proposals to substitute the system of popular election have been rare and they have found few advocates. Numerous proposals, however, have been made and advocated for the enlargement of the electoral body which chooses the president, by joining with it a number of delegates representing certain local bodies or interests such as the departmental councils, the academies, the universities, the chambers of commerce, the labor unions, etc. It may be interesting to note in this connection that the people of Switzerland in 1903 defeated by an immense majority a proposal to substitute popular election of the federal executive council in the place of the existing method of election by the legislature. This was a striking illustration of the Swiss conception that popular election of executive functionaries is not an essential feature of democracy.

<sup>38</sup> *Op. cit.*, p. 249. Two other advocates of election by the legislature were Esmein, "Droit constitutionnel," pp. 483 ff.; and Laveleve, "Le gouvernement dans la démocratie," vol. I, pp. 347-349. Esmein denied that choice by the legislature involves a violation of the principle of the separation of powers.

It should be noted also that in parliamentary-governed states, or those in which the cabinet system is fully established, the actual executive is *virtually* chosen by the legislature or by the lower house of the legislature. In those states—so numerous and so well governed—there is no attempt to separate the executive and legislative powers, but on the contrary the plan is devised to secure coöperation and harmony between them. While the actual executive—the cabinet, or at least the prime minister—may be nominally appointed by the titular executive, the appointment must be in conformity with the wishes of the popularly elected representatives in the legislature, as explained in a previous chapter.

### III. THE TERM OF THE CHIEF EXECUTIVE

**Views of Hamilton and Story.**—“The ingredients which constitute energy in the executive,” said Alexander Hamilton, “are: first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers”; while those “which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility.”<sup>39</sup> The element of “duration” was, he observed, necessary to secure “personal firmness of the executive magistrate in the employment of his constitutional powers” and to insure the “stability of the system of administration which may have been adopted under his auspices.”<sup>40</sup> Hamilton stood almost alone among the distinguished men who framed the constitution of the United States in advocating a good behavior tenure for the President, the idea being repugnant to the views of the majority of the delegates as being inconsistent with republican ideas, and hence it received little consideration at the hands of the convention.<sup>41</sup> Concerning the length of term sufficient to secure the elements of “firmness” in the executive and “stability” in the administration, Hamilton declared that “the longer the duration in office the greater will be the probability of obtaining so important an advantage.” In this opinion

<sup>39</sup>*The Federalist.* No. 70. The numbering here is that observed in Ford's Edition. <sup>40</sup>*Ibid.*, No. 71.

<sup>41</sup> Madison and Jay also favored the good behavior tenure for the President. After it was decided to make the office elective Hamilton seems to have changed his opinion. See Story, “Commentaries,” sec. 1435, note 2.

Judge Story fully concurred. Few men, he declared, would be willing to commit themselves to a course of policy whose wisdom might be perfectly clear to themselves if they could not be permitted to complete what they had begun. "Of what consequence," he observed, "will it be to form the best plans of executive administration, if they are perpetually passing into new hands before they are matured, or may be defeated at the moment when their reasonableness and their value cannot be understood or realized by the public—who will plant when he can never reap?"<sup>12</sup>

**Practice of States.**—That the term of the chief executive ought to be long enough to secure these advantages no one will deny, but as to what this period is, the testimony of political writers and the practice of states differ. In practice, the executive tenure ranges from two years, which is the rule in many of the North American states, to seven years, which is the term of the presidents of the French Republic, Portugal, Germany, Czechoslovakia, Poland, and Venezuela. In the state of New Jersey the executive has a three-year term; the remaining states are divided about equally between two- and four-year terms. The term of the Swiss Executive Council is three years; that of the presidents of the United States, Brazil, and Austria, four years; the presidents of Peru and China are chosen for five years; and those of Chile, Argentina, Mexico, and Finland, for six years. The titular chief executives of the self-governing dominions of Great Britain hold during the pleasure of the crown; and the cabinets in these and all other states having the cabinet system of government hold office, of course, so long as they are able to command the support of the legislature.

**Arguments for and against Short Terms.**—The argument in favor of short tenures for the executive is that the shorter the term of office the greater the security against abuses of power;<sup>13</sup> and conversely, the longer the term, the less will be the means of enforcing responsibility and the greater the personal ambition of the executive. The belief has always been widespread in democratic countries that executives with long tenures are exposed to a strong temptation to transform their offices by means of a *coup d'état* into monarchical

<sup>12</sup> "Commentaries," sec. 1433.

<sup>13</sup> Compare Esmein, "Droit constitutionnel," p. 479.

tenures, as Napoleon did when he converted his consulship of ten years into one for life and then into an imperial office. On the other hand, as Judge Story remarked, the testimony of experience shows that a very short term is, practically speaking, equivalent to a surrender of the executive power as a check in government, and besides leads to "an intolerable vacillation and imbecility."<sup>41</sup> "A man is apt to take a slender interest," said Hamilton, "in so shortlived an advantage and to feel little inducement to expose himself to any considerable inconvenience or hazard."<sup>42</sup> The most, he added, that could be expected of the majority of men in such positions would be the negative merit of not doing harm instead of the positive merit of doing good.<sup>43</sup>

Moreover, unless the practice of reëlection is followed, the office must continually be occupied by an inexperienced executive, since he cannot acquire any considerable degree of familiarity with its duties in so brief a period. Finally, short tenures necessitate a frequent recurrence of elections, with the inevitable distractions and disturbance to business that are inseparable from important political contests.<sup>44</sup> A four-year tenure has much more to commend it. It is a period, observed Chancellor Kent, perhaps reasonably long enough to make the executive "feel firm and independent in the discharge of his trust and to give stability and some degree of maturity to his system of administration" and "certainly short enough to place him under a dire sense of dependence on the public approbation."<sup>45</sup> At all events, it is not long enough, as Judge Story remarked, to justify any alarms for the public safety.<sup>46</sup> On the other hand, a six-year or seven-year

<sup>41</sup> "Commentaries," sec. 1435. Compare Wilson ("Congressional Government," p. 255), on the "unrepublicanism" of short terms.

<sup>42</sup> *The Federalist*, No. 71. <sup>43</sup> *Ibid.*, No. 72.

<sup>44</sup> Compare De Tocqueville, *op. cit.*, vol. I, p. 221, on the evils of frequent elections in America.

<sup>45</sup> "Commentaries," vol. I, p. 280.

<sup>46</sup> "Commentaries," sec. 1439. See also Rawle, "On the Constitution," ch. 31. Story expressed a doubt whether in point of firmness and independence the President of the United States would be equal to the task assigned by the constitution in view of his short term. There were important reasons, he said, why he should have a longer term than the state executives, the chief one being the difference in the nature of their duties. The duties to be performed by the President, both at home and abroad, he said, were so various and complicated as not only to require great talents and great wisdom, but also long experience in office, to acquire what may be deemed the habits of administration, and a

term would seem to be unduly long under a system in which the president actually exercises the powers conferred upon him and where he is supposed to be responsible to those who elect him, for the manner in which he exercises them. A responsibility which cannot be enforced at shorter intervals than once in six or seven years manifestly loses much of its effectiveness.

**The Question of Reeligibility.**—Closely connected with the length of term is the question of reeligibility of the chief executive to a second term. The constitution of the United States, which fixes the term of the President at four years, expressly declares that he shall be eligible to succeed himself and there is no constitutional limitation as to the number of terms which he may serve. Tradition and custom, however, have limited the number to two, and, with two exceptions, no incumbent of the office has ever attempted to break this well-established rule, while several have refused to be candidates for a third term in the face of a public sentiment which apparently demanded their reelection. This usage, observed Chancellor Kent, has indirectly established by the force of public opinion "a salutary limitation to his capacity for a continuance in office."<sup>50</sup> The constitution of the Southern Confederacy fixed the term of the executive at six years and declared the President ineligible to succeed himself, and this principle has been introduced into the constitutions of a few states, for example Portugal (term 7 years) and Mexico (term 6 years). The constitution of Mexico in 1857 fixed the term of the president at six years and was silent on the question of reeligibility. Under it Diaz was reelected for six successive terms. The constitution of 1917, however (which fixed the term at four years, later changed again to six), declares the president ineligible to reelection. In some states the president is ineligible to succeed himself but is reeligible after the lapse of an intervening term. Among these are Brazil, Chile, Argentina, Spain, and Peru.<sup>51</sup> The constitutions of China, Austria and

steadiness as well as comprehensiveness of view of all the bearings of measures. The duties of the state executives, on the contrary, were few and confined to a narrow range. *Ibid.*, sec. 1440.

<sup>50</sup> "Commentaries," vol. I, p. 282.

<sup>51</sup> The French constitutions of 1793 and 1848 made the executive ineligible to succeed himself, though he was eligible to a reelection after an interval of five years. This prohibition was one of the causes which led to the *coup d'état* by Louis Napoleon in December, 1851. See Esmein, *op. cit.*, pp. 479, 542.

Czechoslovakia allow the president to serve two terms, after which he is ineligible to reëlection.<sup>52</sup> The German constitution, which fixes the term of the president at seven years, expressly declares that he is eligible to reëlection. But this provision was the object of criticism by the Social Democrats, who argued for a shorter term—five years—coupled with ineligibility to reëlection. The president of the French Republic, although possessing the long term of seven years, is eligible to succeed himself. But a custom now definitely established limits him to a single term. Only one president (Grévy) has ever been reëlected to a second term. None of his successors have been candidates for reëlection; in fact most of them have declared in their messages of thanks at the beginning of their terms, or otherwise made known their intention, that they would not seek a reëlection. It may, therefore, now be said that the single-term tradition has become an established rule of French constitutional practice.

**Arguments in Favor of a Single Term.**—The principal argument in favor of restricting the executive to a single term is that it would serve as a check upon his personal ambition and prevent him from a "cringing subserviency" to procure his reëlection or from resorting to corrupt intrigues for the maintenance of his power.<sup>53</sup> If the chief executive may immediately succeed himself, it is contended, the value of short terms is in effect destroyed. Ineligibility to a second term, therefore, would tend to secure greater independence in the executive and at the same time greater security to the people. An executive capable of succeeding himself is exposed to a strong temptation to conduct his administration with the one end in view of securing a reëlection.<sup>54</sup>

<sup>52</sup> But the constitution of Czechoslovakia makes a special exception in the case of the first president, Masaryk, in consideration of his great service in the foundation of the state. He is therefore eligible to as many terms as the electorate may choose to give him.

<sup>53</sup> Story, *op. cit.*, sec. 1442; *The Federalist*, No. 72; and Rawle, *op. cit.* ch. 81. "Intrigue and corruption," said De Tocqueville, "are the natural defects of elective government: but when the head of the state can be reëlected, these evils rise to a great height and compromise the very existence of the country." *Op. cit.*, vol. I, p. 142.

<sup>54</sup> Compare Esméin, *op. cit.*, p. 478. Thomas Jefferson appears to have entertained the opinion in 1787 that the chief executive ought to be restricted to a single term, though he himself did not hesitate to accept a reelection. "Reason and experience tell us," he said, "that the chief magistrate will always be

Writing on this point about a century ago, De Tocqueville declared: "It is impossible to consider the ordinary course of affairs in the United States without perceiving that the desire of being re-elected is the chief aim of the President; that his whole administration, and even his most indifferent measures, tend to this object; and that, as the crisis approaches, his personal interest takes the place of his interest in the public good. The principle of reëligibility renders the corrupt influence of elective government still more extensive and pernicious. It tends to degrade the political morality of the people, and to substitute adroitness for patriotism."<sup>55</sup> Again he affirmed, what cannot be denied, that "whatever the prerogatives of the executive power may be, the period which immediately precedes an election, and the moment of its duration, must always be considered as a national crisis, which is perilous in proportion to the internal embarrassments and the external dangers of the country." Moreover, if the executive may succeed himself, a large portion of the latter part of his first term will be occupied with matters relating to his candidacy, to the neglect of his official duties. On this point De Tocqueville truthfully remarked that "at the approach of an election the head of the executive government is wholly occupied by the coming struggle; his future plans are doubtful; he can undertake nothing new, and he will only prosecute with indifference those designs which another will perhaps terminate."<sup>56</sup>

**Movement in the United States to Limit the President to a Single Term.**—In recent years there has developed considerable sentiment in the United States in favor of lengthening the term of the President and making him ineligible to succeed himself. As is well known, the convention which framed the constitution originally agreed upon a seven-year term for the President without the privilege

re-elected if he may be re-elected. He is then an officer for life." Near the end of his life, however, he wrote, "My wish was that the President should be elected for seven years and be forever ineligible afterwards. This term I thought sufficient to enable him, with the concurrence of the legislature, to carry through and establish any system of improvement he should propose for the common good. But the practice adopted, I think, is better, allowing his continuance for eight years with a liability to be dropped at halfway of the term, making that a period of probation." Jefferson's "Works," vol. IV, p. 565.

<sup>55</sup> *Op. cit.*, vol. I, p. 142.

<sup>56</sup> *Ibid.*, p. 134.

of reëlection, but when it was decided that he should not be elected by Congress, the main objection to reëligibility was removed. In 1912 President Wilson was elected on a platform which pronounced in favor of a constitutional amendment making the President ineligible to reëlection, although he himself did not approve it and in fact declared against it. In 1913 the Senate by a vote of 47 to 23 adopted a resolution to amend the constitution so as to fix the presidential term at six years and rendering the occupant of the office ineligible to a second term. The Judiciary Committee of the House of Representatives made a favorable report on the proposal. In its report it enumerated the following reasons in support of the amendment : first, it would remove the temptation which the President is under to use improperly the powers and patronage of his office to obtain a reëlection ; second, it would "tend to improve the administration of the laws generally and to increase the nonpartisan and businesslike efficiency of the executive department by taking away from the President all inducement to build up a political machine instead of attending to his duties as chief magistrate of the republic" ; and third, it would save the President from "the humiliating necessity of going on the stump to repel assaults made upon him."<sup>57</sup> The resolution, however, never came to a vote in the House, though there is still much sentiment in favor of the proposed change.<sup>58</sup>

**Arguments in Favor of Reeligibility.**—To many minds, however, the advantages of reëligibility are greater than the disadvantages. By no one were those advantages more clearly and forcibly stated than by Hamilton in *The Federalist*. The reëligibility of the executive is necessary, he declared, to "enable the people, when they see reason to approve of his conduct, to continue him in the station in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration." First of all, the restriction of the executive to a single brief term would tend to diminish the inducements to good behavior. "There are few men," he observed, "who would not feel much less zeal in the discharge of a duty when they were conscious that the advantages of the station with which it was connected must be re-

<sup>57</sup> See Report No. 885, H. of R. 62d Cong. 2d Ses.

<sup>58</sup> It is advocated by ex-President Taft in his book, "Our Chief Magistrate and His Powers," p. 4.

linquished at a determinate period, than when they were permitted to entertain a hope of obtaining, by meriting, a continuance of them." The desire of reward and fame, he continued, is one of the strongest incentives of human conduct; and the best security for the fidelity of mankind is to make their interest coincide with their duty. Furthermore, the rule of ineligibility would tend to create in the executive a propensity to make the best use of his opportunity, while it lasted, for promoting his personal ends, and he "might not scruple to resort to the most corrupt expedients to make the harvest as abundant as it was transitory."<sup>59</sup> There is, said Hamilton, an excess of refinement in the idea of disabling the people from continuing in office those who have entitled themselves to the public approbation and confidence.

If, he argued, the executive could expect to prolong his honors by his good conduct he might hesitate to sacrifice his "appetite for gain." But with the "prospect before him of approaching an inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity, or his ambition."<sup>60</sup>

In the next place the effect would sometimes be to deprive the state of the services of a wise and experienced official by compelling him to abandon his office at the very time when by reason of his experience he is best fitted to serve it. It would, said Judge Story, be equivalent to banishing merit from the public councils because it had been tried. "What could be more strange," observed this distinguished jurist, "than to declare at the moment when wisdom was acquired that the possessor of it should no longer be enabled to use it for the very purpose for which it was acquired."<sup>61</sup> Finally it would, to quote Hamilton again, "operate as a constitutional interdiction of stability in the administration." Every election would be followed by an interruption in the continuity of executive policies and the latter

<sup>59</sup> *The Federalist*, No. 72; also Story, *op. cit.*, sec. 1443.

<sup>60</sup> *The Federalist*, No. 72. Hamilton further remarked that "an ambitious man, too, when he found himself seated on the summit of his country's honors, when he looked forward to the time at which he must descend from the exalted eminence forever, and reflected that no exertion of merit on his part could save him from the unwelcome reverse; such a man, in such a situation, would be more violently tempted to embrace a favorable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty."

<sup>61</sup> "Commentaries," sec. 1444.

part of each term would be a period of doubt, of weakness, and passive inactivity. The administration, in short, "would drift along without plan or policy."<sup>62</sup>

In conclusion, it may be observed that the wisdom and expediency of restricting the chief executive to a single term necessarily depend to a large extent upon the length of the term and the extent of the powers which he actually exercises. Manifestly an executive with a term of six or seven years might be made ineligible to a second term with far less impropriety than one whose term is two years, for the obvious reason that his responsibility would be "greatly diminished and his means of influence and patronage immensely increased so as to check in a great measure the just expression of public opinion and the free exercise of the elective franchise." Likewise there would be no great danger in the perpetual reëligibility of a president, like that of France, who is merely a titular figurehead with few powers which he can actually exercise.

<sup>62</sup> "I am so near the time of my retirement from office," said President Jefferson, on the 21st of January, 1809 (six weeks before the expiration of his term), "that I feel no passion, I take no part, I express no sentiment. It appears to me just to leave to my successor the commencement of those measures which he will have to prosecute and for which he will be responsible."

## CHAPTER XXIII

### THE EXECUTIVE ORGAN (*Continued*)

#### IV. THE EXECUTIVE POWER

**Nature of the Executive Power.**—What is the best constitution for the executive department and what are the powers with which it should be intrusted, said Judge Story, are problems among the most important and probably the most difficult of solution of any involved in the theory of free governments.<sup>1</sup> The first of these problems has already been discussed ; it remains now to consider the powers and duties which properly belong to the executive department.

Roughly speaking, the executive power may be classified under the following heads :

*First*, that which relates to the conduct of foreign relations and which may be denominated the diplomatic power.

*Second*, that which has to do with the execution of the laws and the administration of the government ; this may be denominated the administrative power.

*Third*, that which relates to the conduct of war and which may be described as the military power.

*Fourth*, the power to grant pardons to persons charged with or convicted of crime ; this may be called the judicial power of the executive.

*Fifth*, that which relates to legislation, or the legislative power.

The constitutions of all states intrust the chief executive, either alone or in conjunction with the legislature or one chamber thereof, with the authority to conclude treaties and other international agreements with foreign states. Everywhere he is the representative of the state in its relations with foreign powers ; he appoints diplomatic representatives to foreign states and receives those accredited to him by foreign states. The power to receive a foreign diplomatic representative is generally interpreted to include the power to recognize or refuse to recognize the independence of the state which he re-

<sup>1</sup> "Commentaries," sec. 1410.

presents or the legitimacy of the government which accredits him. Strictly speaking, the treaty-making power is neither purely executive nor purely legislative in character. It constitutes, as Esmein remarks, a sort of mixed zone occupied at the same time by both the legislative and executive authorities.<sup>2</sup> But whether it be executive or legislative in character, there is practically no difference of opinion with regard to the wisdom of intrusting it to the executive. The legislature, or one chamber of it, however, may very properly be vested with the negative power of ratification as a means of checking the errors or abuses of an unwise, ambitious, or unscrupulous executive, though owing to the peculiar nature of the treaty-making power, the legislature cannot wisely be allowed a direct participation in the negotiation. Alexander Hamilton well observed that "accurate and comprehensive knowledge of foreign politics, a steady and systematic adherence to the same views, a nice and uniform sensibility to national character, decision, secrecy, and dispatch are incompatible with the genius of a body so variable and so numerous." The "fluctuating and multitudinous composition of the legislature," he continued, "forbid us to expect in it qualities which are essential to the proper execution of such a trust."<sup>3</sup> Nevertheless, as Story observed, "it is too much to expect that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively upon the subject of treaties."<sup>4</sup>

In a few monarchical states like Great Britain, this power is exclusively in the hands of the executive, parliament having no share except where legislation may be necessary to perfect the treaty or carry it into effect. In such states, therefore, the executive is both the negotiating and ratifying authority. But during and following the World War this feature of the British constitution was the subject of considerable criticism by certain Liberals and by the members of the Labor party who demanded the introduction of what they called democratic control of foreign policy. They charged that British diplomacy was characterized by too much secrecy and too little regard for public opinion; that Great Britain had been committed to unwise

<sup>2</sup> "Droit constitutionnel," p. 568.

<sup>3</sup> *The Federalist*, No. 75. Compare also Esmein, *op. cit.*, p. 568; and Kent, *op. cit.*, vol. I, pp. 285-286.

<sup>4</sup> *Op. cit.*, sec. 1512.

foreign engagements without the approval of the public and without the knowledge of parliament; some even charged that she had been led into the World War through secret bungling diplomacy, when if the public had been kept properly informed and its wishes followed, England would never have been involved in the conflict.<sup>5</sup> They demanded, therefore, that all treaties should be laid before parliament for its assent, and when the new Labor government came into power in 1922, it announced that this procedure would be followed. With the return to power, however, of the Conservative party, the old practice was reverted to.

In the majority of states, however, monarchies as well as republics, the assent of the legislature or one branch of it is essential to the validity of all treaties or certain classes of them. In the United States, for example, the consent of the Senate is required by the constitution, though the right of the executive to conclude certain kinds of international agreements independently of the Senate has long been acquiesced in.<sup>6</sup> In practice the power of the United States Senate is not restricted to the mere negative function of ratifying or rejecting the treaties negotiated by the executive, but it claims and has many times exercised the right of virtually amending those submitted for its approval.<sup>7</sup> The House of Representatives likewise exercises

<sup>5</sup> See among other books dealing with the subject Dickinson, "The Choice Before Us"; Morel, "Ten Years of Secret Diplomacy"; and Ponsonby, "Democracy and Diplomacy." The general subject of popular control of diplomacy is discussed by Chow, "Le contrôle parlementaire de la politique en Angleterre, en France, et aux Etats-Unis" (1920), and by Barthélémy, "Démocratie et la politique étrangère" (1917).

<sup>6</sup> See an article by J. B. Moore on "Treaties and Executive Agreements," in the *Political Science Quarterly*, for September, 1905; also his "Digest of International Law," secs. 752-753; and S. B. Crandall, "Treaties, Their Making and Enforcement," pp. 86-88.

<sup>7</sup> For examples, see Crandall, *op. cit.*, p. 71. In a debate in the Senate in 1916 the contention was put forward by certain senators that the President was bound by the Constitution to obtain the advice of the Senate in advance of negotiation; that the "advice and consent" required by the constitution means not merely "consent" but also "advice," which necessarily must be obtained before negotiations are entered upon. This contention was again put forward during the debates on the Treaty of Versailles in 1919; notably by Senator LaFollette. The whole subject is fully discussed by Crown, "The President's Control of Foreign Relations" (1917); by Matthews, "The Conduct of American Foreign Relations" (1922); by Taft, "Our Chief Magistrate and His Powers" (1915); by Fleming, "The Treaty Veto of the American Senate" (1923); and by Wright, "The Control of Foreign Relations" (1922).

an indirect share in the treaty-making power through its right to give or withhold its consent to legislation which may be necessary to carry into execution a treaty; such, for example, as one which stipulates for an appropriation of money. Moreover, the necessity for its approval of treaties which have to do with the regulation of foreign commerce, such as commercial reciprocity agreements, is now admitted by both the Senate and the President.

In the German Republic treaties and alliances concluded by the president require the assent of the Reichstag when they relate to subjects which fall within the jurisdiction of the *Reich*--which would seem to include practically all treaties and alliances, except minor agreements between the individual states themselves or with their foreign neighbors relating to matters which are within their competence. In France treaties of peace and commerce, and treaties which involve the finances or territory of the state or affect the personal or property rights of Frenchmen in foreign states, must receive the assent of both chambers. The French chambers, however, cannot modify or amend treaties submitted for their consideration as the Senate of the United States may, but must approve or reject them as a whole.<sup>8</sup>

The requirements of the Finnish and Polish constitutions are essentially the same as that of France. In Czechoslovakia not only commercial treaties and those which entail financial burdens, but also those which impose military or "personal" burdens upon the citizens, must be approved by parliament. The Belgian requirement is practically the same. In Brazil and Chile apparently all treaties without exception must be approved by both houses of congress. In the United States, where one hears much criticism of the existing constitutional rule which places it within the power of one more than one-third of the members of the Senate to defeat the ratification of treaties, ratification by both houses of Congress by a simple majority has recently been proposed by various statesmen and publicists. As already pointed out in an earlier chapter, Switzerland by a recent constitutional amendment provides for a popular referendum on treaties of more than fifteen years' duration. This amendment introduces the principle of popular control of diplomacy in a form which is not found in any other country.

<sup>8</sup> Esmein, "Droit constitutionnel," p. 577.

**Administrative Powers ; Power of Appointment.**—In the domain of internal administration the principal power and duty of the executive is to direct and supervise the execution of the laws. He is the chief of the administration and the responsible head of the civil service. As such he exercises a wide power of control over the personnel of the administrative service through his power to appoint, direct, and remove his subordinates.<sup>9</sup> In most republican states and in a few of the monarchical type the power of the chief executive is limited by the requirement that his appointments shall be approved by one branch of the legislature. Thus in the United States the nominations of the President must be confirmed by the Senate; and this practice is followed in some of the Latin-American constitutions<sup>10</sup> and in those of the component states of the American republic. The power of the President of the United States to remove, however, is not limited by the necessity of obtaining the consent of the Senate, as is the case in making appointments, and it is now settled that Congress has no constitutional right to abridge his power of removal. Ordinarily the appointing power of the chief executive extends only to political, judicial, and military functionaries; but in some European states (*e.g.*, Czechoslovakia) the constitution gives him the power to appoint university professors.

There is little difference of opinion in regard to the wisdom of executive appointment of the higher officials,<sup>11</sup> though as to whether

<sup>9</sup> The French make a distinction between the *political* or *governmental* functions of the executive and the purely *administrative* functions. The former category includes such matters as the summoning and opening of the legislative chambers, the conduct of foreign relations, the disposition of the military forces, and the exercise of the right of pardon. The administrative authority, on the other hand, embraces all those matters which have to do more directly with the strict administration of the government, such as the appointment, direction, and removal of officers; the issue of instructions and ordinances; and, in general, all acts relating more directly to the execution of the laws.

<sup>10</sup> The constitution of Chile (1925), however, requires the approval by the senate only of appointments of ambassadors and ministers (Art. 72), while that of Brazil (Art. 48) requires the approval by the senate of the appointment only of judges of the supreme court and diplomatic representatives.

<sup>11</sup> There is of course some sentiment in the United States, especially among the more radical democratic element, in favor of popular election of many federal officials, including even the judges. The provision of the national constitution which vests the appointment of practically all federal officials in the President represents the conception of democracy which prevailed at the end of eighteenth century, rather than that which is now current. In this respect there is a striking

the executive should be independent in his choice or subject to the control of a council or a senate, there is no such unanimity of opinion or practice. In defense of the method provided by the constitution of the United States, Hamilton observed that "it is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union, and it will not need proof that on this point must essentially depend the character of its administration." "One man of discernment," he declared, "is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even of superior discernment" "The sole and undivided responsibility of the executive," he went on to say, naturally begets a livelier sense of duty and a more exact regard to reputation. He will inquire with more earnestness and decide with more impartiality. He will have fewer personal attachments to gratify than will a body of men, and will be less liable to be misled by his private friendships and affections; or, at all events, his conduct will be more open to scrutiny and less liable to be misunderstood." Nevertheless, the provision that the nominations of the executive should receive the assent of the Senate, Hamilton admitted would be "an excellent check upon a spirit of favoritism in the President and would tend greatly to preventing the appointment of unfit characters."<sup>12</sup>

**Power of Direction.**—Flowing from the right of the chief executive to select and dismiss his subordinates is the right to direct them. This power varies in extent in different countries, and in the same state it often varies as regards different officials. In monarchies and in republics like France, where monarchical traditions are still strong, the directing power of the executive (which of course means the ministry) is very great. In the United States the power of the executive to direct his subordinates is, however, often limited by legislative acts which specify in more or less detail the powers and duties of such officials. Thus the act of Congress organizing the

difference—it is sometimes said to be a paradox—between the theory of democracy upon which the executive part of the national government is based and that of the separate states where the practice of popular election exists on a large scale. Outside the United States, except in Switzerland, where choice by the legislature is common, the practice of executive appointment is nearly universal.

<sup>12</sup> *The Federalist*, No. 75. See also Story, "Commentaries," sec. 1529; Kent, "Commentaries," vol. I, p. 288.

treasury department contains no reference to any presidential power of direction and indicates that the administration of the finances is to be kept under the control of Congress rather than under the executive.<sup>13</sup> Various statutes confer upon the President specific authority to issue instructions and orders to the heads of departments. But aside from specific grants of authority, the President has also a certain power of direction which is inherent in the nature of his office and for which he is not obliged to show statutory authority.<sup>14</sup>

**The Ordinance Power.**—An important power belonging to the chief executive of most states is that which is commonly known as the ordinance power *le pouvoir réglementaire* of the French—a sort of subsidiary power of legislation which takes the form of decrees, orders, or regulations (French *réglements*; German, *Erordnungen*). This power is frequently expressly conferred on a king or on a president of a republic by the constitution.<sup>15</sup> In the United States the power is derived from the clause of the federal constitution which charges the President with the execution of the laws and in France from a somewhat similar clause which imposes upon him the duty of overseeing (*surveiller*) and insuring the execution of the laws (Art. 3, Const. Law of Feb. 25, 1875). In the absence of express authority in the constitution it may be deduced from the very nature of the office as a necessary and inherent power. In monarchial states it is considered a part of the royal prerogative in the absence of constitutional or statutory prohibitions or restrictions. Where the power is expressly conferred by the constitution it is usually qualified by the condition that ordinances promulgated by the

<sup>13</sup> Cf. Fairlie, "National Administration of the United States," p. 16.

<sup>14</sup> "Opinions of Attorneys-General," vol. VI, p. 365.

<sup>15</sup> See, for example, the constitution of Brazil (Art. 48); of Chile (Art. 71); of Finland (Art. 28); of Belgium (Art. 67); of Spain, 1876 (Art. 45); and of Prussia, 1850 (Art. 45). The new constitutions of Prussia, Czechoslovakia, and Poland appear to be silent on the matter. The new German constitution merely refers to the "orders and directions" of the president without dealing at all with the extent of the ordinance power or the limitations under which it may be exercised. In view of the large power of ordinance making which belonged to the emperor and the Bundesrat under the old constitution and which has always played an important rôle in the government of Germany, it may be assumed that it was not the intention of the Weimar assembly to do away with entirely. Nevertheless, the new constitution takes care to provide that the orders and directions of the president must be countersigned by a responsible minister.

executive must not modify or suspend the laws (statutes),<sup>16</sup> or that they must be such only as are necessary or appropriate to the execution of the laws,<sup>17</sup> or that their purpose must be merely to supply the details in the application of the laws.<sup>18</sup> Occasionally constitutions confer on the executive an extraordinary power of ordinance making in times of emergency. Thus the constitution of Denmark (Art. 2) empowers the king in such cases, if the legislature is not in session, "to issue laws of temporary application" subject to the restriction that they must not be contrary to the constitution and must be laid before the legislature at the next session. Upon the outbreak of the European War in 1914 a very large ordinance power was conferred upon the executives in most of the belligerent countries. Thus by the Defense of the Realm Act of Nov. 27, 1914, the British king (in council) was given power, "during the continuance of the present war to issue regulations for securing the public safety and the defense of the realm" an authority which was practically unlimited. In pursuance of this delegation of power an elaborate series of regulations were put into effect which virtually placed the country under a régime of martial law.

**Kinds of Ordinances.**—From the point of view of their nature or purpose ordinances may be variously classified. Thus the German jurists distinguish between "law" ordinances (*Rechtsverordnungen*) and "administrative" ordinances (*Verwaltungsverordnungen*).<sup>19</sup> The effect of the former is to create new law or to modify the existing law. They are essentially a species of executive legislation and are designated by the Germans as *material* law in contradistinction to *formal* law. The "administrative" ordinances are orders or regulations addressed to the administrative authorities and contain rules governing the conduct or functioning of the administrative services. They do not, therefore, bind or affect directly private citizens. In Prussia, at least under the old constitution, the latter type of ordinances could be issued by the proper administrative authority without the necessity of legislative authorization, but the former, after 1850 when Prussia acquired a con-

<sup>16</sup> For example, the constitution of Italy (Art. 6), and Belgium (Art. 67).

<sup>17</sup> For example, those of Brazil and Chile, articles cited.

<sup>18</sup> Constitution of Finland, Art. 473.

<sup>19</sup> This classification is defended by Laband, Jellinek, Meyer and others. As to this see Carré de Malberg, "Théorie générale de l'état," vol. I, pp. 556 ff.

stitution, required legislative authorization, which was often and generously granted.<sup>20</sup>

Ordinances may be further classified in a threefold division: First, those which are, in their nature and effect, laws promulgated by the chief executive in pursuance of a general power of legislation conferred upon him by statute. Such are the decrees issued by the president of the French republic for the government of the French colonies. As a consequence of this authority he and not the French parliament is the legislative organ for the colonies. Second, ordinances issued by the executive in pursuance of legislative authority to regulate specific matters. Such delegations of legislative authority to the president are common in France. Thus an act of parliament authorizes the president to determine by decree the régime of non-navigable waters, to regulate the conditions of appointment and promotion of judges, to modify or suspend existing laws relating to taxes, etc. Third, ordinances issued upon "invitation" of parliament for the purpose of completing and regulating the details of execution of a particular law. This form of ordinance is also very common in France. There statutes are ordinarily brief, contain only the essential ideas of the legislature, and leave the details to be supplied by ordinance.

**The Ordinance Power in France.**—To-day nearly every important act of the French parliament concludes with the familiar clause: "an ordinance of public administration shall determine the measures proper for assuring the execution of the present law." The ordinances issued in pursuance of this injunction complete the law; they supply the details without which it would be unenforceable. The Germans call them supplementary ordinances (*Ergänzungsvorordnungen*). They constitute, says Duguit, a sort of "prolongation" of the law which they supplement. Duguit maintains, properly it would seem,

<sup>20</sup> Compare James, "Principles of Prussian Administration," ch. 4, where the whole subject of the Prussian ordinance power is fully discussed. The French and German literature relating to the ordinance power is very extensive. Among the more important sources may be mentioned Duguit, "Traité de droit const." (1911, vol. II, secs. 160-161); Espelein, "Droit const." (1909), pp. 610 ff.; Carré de Malberg, *op. cit.* (1922), vol. I, pp. 548 ff.; Moreau, "Le règlement administratif" (1902); Barthélémy, "Le pouvoir réglementaire du président," *Rev. Pol. et Polit.*, vol. XV; Cahen, "La loi et le règlement" (1903); Jellinek, "Gesetz und Verordnung" (1887); Hauriou, "Droit administratif"; Jézé, "Principes généraux du droit administratif" (1925), pp. 378 ff.; and the treatises especially of Laband, Meyer, and Anschütz.

that ordinances such as these are materially and intrinsically veritable acts of legislation, though not such in form. In consequence of this practice, especially in recent years, it has come to pass that a large and important part of French legislation is in the form of ordinances, in theory promulgated by the president, in fact by the ministers. Naturally complaints have not been lacking that they are sometimes contrary to the existing statutes. But until 1907 their legality could not be attacked before the Council of State (the supreme administrative court of France) because the Council, considering them as a species of delegated legislation and therefore assimilable to acts of parliament, held that it had no more jurisdiction to declare them null and void than it did to pronounce a statute of parliament illegal. However, in 1907 the Council of State abandoned its traditional view in this respect, took jurisdiction of a case involving the validity of such an ordinance, and pronounced it null and void as being in excess of the authority of the president who issued it.<sup>21</sup> The result of this epoch-making decision is that the ordinance power of the French president, as of every administrative authority, is now subject to judicial control, as in the United States.

**The Ordinance Power in the United States.**—In the United States the ordinance power of the executive is less important because of the practice of Congress and the state legislatures of framing their statutes in more detail, thus obviating the necessity of supplementing

<sup>21</sup> As to this famous decision see Jèze in the *Rev. du droit public*, vol. XXV, pp. 51 ff.; Nezard, "Le contrôle juridictionnel," pp. 22 ff., and my article, "Judicial Control of Legislative and Administrative Acts in France," *Amer. Pol. Sci. Review*, vol. IX (1915), p. 649.

There has been much discussion in France as to whether such ordinances at the result of legislative delegation, one group of writers maintaining that the legislative power cannot be delegated by parliament, the other group maintaining the contrary. As to the principal defenders of each view see my article cited, p. 648. The matter is fully discussed by Carré de Malberg, *op. cit.*, vol. I, pp. 589 ff., and in his article, "La question de la délégation de la puissance législative et les rapports entre la loi et l'ordonnance selon la constitution de Weimar," *Bul. de la Soc. de l'ég. comparée* (1926).

The Council of State has always maintained the theory of legislative delegation and, as stated above, it was for this reason that it long hesitated to admit recourse in excess of power against presidential ordinances issued in pursuance of legislative authority. While abandoning in 1907 its position as to the admissibility of recourse, it nevertheless maintains still its view as to legislative delegation. But the theory is rejected by most French writers.

then by means of executive regulations in order to render them enforceable. Nevertheless, the ordinance power of the President is very considerable and few people are aware of the extent to which it is used or of the quantity of subsidiary legislation in the form of executive orders and regulations actually in force. Of the character of this administrative legislation Professor Fairlie says: "There are indeed, besides presidential proclamations and executive orders, many elaborate systems of executive regulations governing the transaction of business in each of the executive departments, and in the various services both within and without these departments. These include organized codes of regulations for the army, the navy, the postal service, the consular service, the customs service, the internal revenue service, the coast guard, the patent office, the pension office, the land office, the Indian service, the steamboat inspection service, the immigration and the naturalization bureaus, and the civil service rules. In addition to long-established types of regulations, there have been many new series of regulations issued in recent years both before the World War and more recently by the new war agencies, such as Food and Fuel Administration, the War Industries Board, and the War Trade Board."<sup>22</sup> By acts of Congress in 1933 and 1934 President F. D. Roosevelt was given extensive powers of a legislative character.

In addition to this volume of subordinate legislation in the form of presidential proclamations, orders, and regulations, there is a vast body of more specialized rules, orders, and instructions issued by the various departments, bureaus, and commissions.

**The Ordinance Power in Great Britain.**—In Great Britain the king no longer has any inherent power of legislation for completing the laws by means of proclamations or ordinances as he once had, but he may issue regulations addressed to the servants of the crown

<sup>22</sup> "Administrative Legislation," in the *Michigan Law Review*, Jan. 1921; also his "National Administration in the United States," p. 2123. The whole matter is fully treated in the recent monograph of James Hart, "The Ordinance Making Powers of the President of the United States" (1925). See especially chs. 5, 8. There is a good brief discussion of the ordinance power generally in Black, "Relation of the Executive Power to Legislation" (1919), ch. 6.

The validity of executive orders and regulations is not infrequently attacked in the courts on the ground that they are *ultra vires*. Theodore Roosevelt, who maintained that the President had a sort of undefined residuum of power apart from that conferred by the constitution and laws, made considerable use of the ordinance power. See as to this his "Autobiography," p. 376.

for the conduct of public affairs. Moreover, power to make ordinances which have the force of law and which are binding as such upon the whole community is frequently conferred upon the crown by statute, especially in respect to such matters as education, the public health, etc. These ordinances are known as "statutory rules and orders," and they are published every year in a volume similar to that containing the statutes of parliament. The practice of delegating the power of subsidiary legislation of this kind to the crown has steadily increased in recent years until its quantity and importance has become very great.<sup>23</sup>

**The Military Power of the Executive.**—The military power of the executive usually includes the supreme command of the army and navy and other military forces of the state. In some monarchical countries, like Great Britain, it embraces also the right to declare war; although, since it belongs to parliament to provide the means of prosecuting the war, parliamentary consent is in effect necessary. In the United States, however, this latter authority is vested in Congress, though it is possible for the executive in his conduct of the foreign relations of the country to bring about a condition of affairs which will make war a practical necessity.<sup>24</sup> In the German Empire under the old constitution the emperor could declare offensive war only with the consent of the Bundesrat. Under the new constitution the power to declare war and make peace rests with parliament (Art. 45). In Czechoslovakia a three-fifths majority of the legislature is necessary to a declaration of war. In France the assent of both chambers is necessary. Nowhere, even where the executive may initiate hostilities, can extensive war be waged for any length of time without the approval of the legislature, since it and not the executive controls the means for the prosecution of war. Nearly everywhere the right of the executive to dispose of the forces, plan and direct the campaigns, select the commanders, establish blockades, and, in general, do whatever in his judgment may be necessary or expedient to destroy the power of

<sup>23</sup> Cf. Lowell, "Government of England," vol. I, pp. 19-20. See also Dicey, "Law of the Constitution" (2d ed.), 47 ff., and Ilbert, "Legislative Methods and Forms," ch. 3. A recent remarkable example was the "Emergency Powers Act" of 1920, passed during the general strike in England, which conferred on the government or any department thereof the power to take possession of land and coal mines, control traffic, and requisition ships to supplies.

<sup>24</sup> As to this Baldwin, "The Share of the President of the United States in a Declaration of War," *Amer. Jour. of Int. Law*, vol. XII (1918), pp. 1 ff.

the enemy and prosecute the war to a successful conclusion, is recognized.<sup>25</sup> Moreover, it belongs to the President of the United States, in particular, to occupy, hold, and govern temporarily those portions of the enemy's country which have come under the control of the armed forces, and, to this end, he may displace the established civil authority and institute military government, and invest it with such powers as he may choose to confer upon it.<sup>26</sup> Finally, during the existence of the war it belongs to the executive to suspend the ordinary civil guarantees which the constitution has established for the protection of the individual in time of peace. As commander of the armed forces he may establish martial law, suspend the writ of habeas corpus, declare certain acts ordinarily innocent to be military offenses and order the arrest of persons committing them, suppress newspapers, and the like. Many constitutions authorize the president, in times of emergency or grave crises when war does not exist, to declare martial law—the "state of siege" as it is called in Europe—and to suspend temporarily the constitutional rights of the citizens.<sup>27</sup>

War always brings a vast addition to the power of the executive and enables him to assume something of the character of a dictator. Nevertheless, the experience of the past and the testimony of political thinkers almost without exception have concurred in defending the practice of concentrating the military power in the hands of a single person. In the military organization of the state dualism is out of place.

<sup>25</sup> But the constitution of Poland (Art. 46) declares that the president may not exercise the chief command in time of war. That of Finland (Art. 30) says he "shall have power" in time of war to transfer his command to another. That of Chile (Art. 72) requires the approval of the senate to enable the president to command the forces in person. That of Brazil (Art. 48) authorizes the president to designate some one to exercise the supreme command in time of war.

<sup>26</sup> Cf. Thomas, "A History of Military Government in Newly Acquired Territory of the United States," pp. 15-20. As to the war powers of the President of the United States, in general, see especially Berdahl, "War Powers of the Executive of the United States," *University of Illinois Studies in the Social Sciences*, vol. IX, Nos. 1 and 2 (1921).

<sup>27</sup> See, for example, the new German constitution, Art. 48. In pursuance of the authority thus conferred upon the president of the German republic the city of Berlin was placed under martial law from January to May, 1920; and from November 8, 1924, to February 14, 1925, the whole country was under martial law in consequence of the attempted counter-revolution of Hitler and Ludendorff. As to the so-called emergency powers of the executive, see Hart, *op. cit.*, pp. 59 ff.

But in some countries (e.g., France) a state of siege can be declared only by parliament.

"Of all the cares or concerns of government, the direction of war," said Alexander Hamilton, "most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a useful and essential part in the definition of the executive authority."<sup>28</sup> "The command and application of the public force," said Chancellor Kent, "to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature and require the exercise of qualities so peculiarly adapted to this department, that they have always been exclusively appropriated to it in every well-organized government on earth."<sup>29</sup>

**The Pardoning Power.**—Finally, the right of pardon or clemency (the *droit de grâce* of the French) is by common consent regarded as a natural and necessary part of the executive power. Beccaria stood almost alone among the political writers of his time in condemning the practice of granting pardons to those whom the courts have convicted of crime.<sup>30</sup> Montesquieu, while considering it to be one of the "most useful and necessary attributes of monarchs, did not regard it as having any place in republics.<sup>31</sup> Some English lawyers of high standing, observed Chancellor Kent, have strangely concluded that it cannot exist in a republic because "nothing higher is acknowledged than the magistrate." But, as Kent very properly added, "It may be fairly insisted that the power may exist with greater safety

<sup>28</sup> *The Federalist*, No. 74.

<sup>29</sup> "Commentaries," vol. I, p. 283. As is well known, during the World War the President of the United States became, in consequence mainly of the vast authority conferred upon him by a succession of acts of Congress, a veritable dictator. For lack of space, it is not possible here to enter into a discussion of the powers thus conferred upon him and actually exercised by him. The matter is discussed by Hart, *op. cit.*, pp. 98 ff., where the "more salient delegations" to President Wilson are classified under thirty-two different heads. See also my article entitled "Le pouvoir exécutif Américain en temps de guerre," in the *Revue du droit pub. et de la science politique*, vol. XXXV (1918), pp. 5 ff. See also Ford's articles, "The Growth of Dictatorship" and "The War and the Constitution," *Atlantic Monthly*, vols. CXX and CXXI (pp. 485 and 632 ff.), and Rogers, "Presidential Dictatorship in the United States," *Quarterly Review*, vol. CCXXI, pp. 34 ff. Similar powers were conferred upon the chief executives of other belligerent countries during the war.

<sup>30</sup> See his "Des délits et des peines," ch. 21.

<sup>31</sup> "Esprit des lois," bk. VI, ch. 21.

in free states than in any other forms of government, because abuses of the discretion unavoidably confided to the magistrate in granting pardons are better guarded against by the sense of responsibility under which he acts."<sup>32</sup>

Considerations of justice and humanity require that the principle of clemency shall have a place in the administration of justice. No system for the administration of justice is or can be free from imperfections. It is impossible, says Esmein, that there should not occur at times in the administration of justice judicial errors which would result in the condemnation of innocent persons.<sup>33</sup> One purpose of the pardon is to correct such errors. It is impossible also, as Esmein remarks, that the criminal law in fixing the punishment of crime should foresee all the extenuating circumstances that may have attended the commission of a particular offense.<sup>34</sup>

The power of pardon then being required by considerations of humanity and sound public policy, the same considerations conspire, said Hamilton, to dictate that this benign prerogative should be fettered or embarrassed as little as possible.<sup>35</sup> In China (Const. 1923, Art. 87), the president may grant pardons only with the approval of the supreme court. In some of the states of the American Union the executive in the exercise of this power is associated with an advisory board which is charged with investigating applications for clemency and making recommendations to the executive. Many constitutions except the offense of impeachment from the pardoning power of the executive, and a few make the same exception in the case of treason.<sup>36</sup> Impeach-

<sup>32</sup> "Commentaries," vol. I, p. 281. The English lawyer referred to by Kent was doubtless Blackstone, who said, "In democracies this power of pardon can never subsist, for there nothing higher is acknowledged than the magistrate who administers the laws, and it would be impolitic for the power of judging and of pardoning to center in one and the same person."

<sup>33</sup> A notable case was that of Adolf Beck in England in 1796.

<sup>34</sup> "Droit constitutionnel," p. 532. "The pardoning power," says a former President of the United States (Harrison, "This Country of Ours," p. 144), "proceeds upon the grounds that, by reason of the rigidity of the criminal code, of the liability to error of every human tribunal, and of the possible discovery of such errors or of new evidence—there should be lodged in some officer or department the power to remit or mitigate a sentence." See also the observations of ex-President Taft in his "Our Chief Magistrate and His Powers," pp. 119 ff.

<sup>35</sup> *The Federalist*, No. 74.

<sup>36</sup> Nevertheless the constitution of the French Republic allows the president to grant pardons to ministers who have been impeached. The constitution of

ment is a form of trial usually conducted by the legislature for crimes committed by high officials, and the purpose of the exception referred to is to remove the temptation of the executive to shield public officials, especially those of his own selection, who might be his instruments or his partners in crime. Treason being a crime "leveled against the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature."<sup>37</sup> With these exceptions the power of pardon is general and unqualified. So far as the President of the United States is concerned, it may be exercised before as well as after conviction, and it usually embraces the remission of fines and forfeitures and the granting of reprieves and commutations. It also includes the right of amnesty, or the right of absolving by general proclamation large numbers of persons from the consequences of their acts—a power which considerations of humanity and public policy make a necessity in times of internal disturbance and insurrection.<sup>38</sup>

**Miscellaneous Powers of the Chief Executive.**—Such in summary are the powers commonly conferred upon or exercised by the chief executive—leaving aside for the moment those which relate to legislation, to be discussed in the next section. In addition to these, certain miscellaneous powers are conferred upon the chief executive by the constitutions of some states. Thus the constitution of Austria (Art. 65) empowers the president to create and confer professional titles, to legitimize illegitimate children, and it adds that other powers may be conferred upon him by law. That of Czechoslovakia (Art. 64) authorizes the president to grant donations and pensions in special cases upon recommendation of the ministry; that of Finland (Art. 31)

China requires the consent of the senate in the case of pardons in impeachment cases and that of Chile confers the power on congress.

<sup>37</sup> A strenuous effort was made in the constitutional convention of 1787 to except cases of treason as well as of impeachment from the President's power of pardon and would, not unlikely, have succeeded had it not been for the difficulty of agreeing as to where the power of pardon in such cases could be better lodged than in the President.

<sup>38</sup> But generally in Europe the power of amnesty can be exercised only by the legislature, not by the executive. In Czechoslovakia, however, the president may grant both pardons and amnesties (Const. Art. 103). But the constitution of Poland (Art. 47) declares that amnesties can be granted only by statute and that of Brazil (Art. 74) has substantially the same provision.

authorizes the president to naturalize aliens and to release Finns from their nationality ; while that of Chile (Art. 72) authorizes the president to grant pensions and retirement allowances to widows and to orphans in accordance with the laws, and to grant juridical personality to private corporations, and to cancel the same and to approve or disapprove their statutes. By a sort of blanket clause the constitution of Chile (Art. 71) charges the president with the administration and government of the state and declares that his authority extends to everything which has as its purpose the preservation of internal public order and external security, in accordance with the constitution and the laws. The long enumeration of his specific powers in the constitution does not therefore exhaust his authority.

#### V. RELATION OF THE EXECUTIVE TO THE LEGISLATIVE POWER

**Power of the Executive in Respect to Legislation.**—“The relation of the supreme executive to the legislative organ,” said Sidgwick, “is one of the knottiest points in constitutional construction,”<sup>39</sup> and it is the nature of this relationship which serves to distinguish the two most important forms of government—the cabinet system and the presidential system—from each other. In practice there is no state in which the sphere of the executive power is totally separate from and independent of that of the legislature, not even those in which the presidential system of government is found. Everywhere the executive is given a certain power of control over the work of the legislature and of participation directly or indirectly in the function of legislation. Conversely, in all states the chief executive is subject in certain respects to the control of the legislature through its power to create offices and prescribe their duties, establish government services, appropriate money for their maintenance, and to impose duties or obligations upon him.<sup>40</sup>

The control of the executive over the legislature consists in the power to summon it and to open, adjourn, and prorogue its sessions and, in countries having the cabinet system of government, to dissolve it and to order new elections. In republican states the power of the

<sup>39</sup> “Elements of Politics,” p. 429.

<sup>40</sup> On the subject of legislative control of the executive, see St. Girons, “La séparation des pouvoirs,” pp. 352 ff. On the subject of the executive as the agent of the legislature, see Barthélémy, “Le rôle du pouvoir exécutif dans les républiques modernes,” bk. II, ch. I.

executive to convene the legislature is usually limited to the calling of extraordinary sessions in times of emergency for the consideration of special matters which need immediate attention. In most such states either the constitution or the statutes prescribe the date for the assembling of the regular sessions of the legislature, and no call of the executive is necessary.<sup>41</sup> In states having the cabinet form of government, however, the legislature usually convenes only upon a call of the executive, though in most cases the executive, which, of course, means the cabinet, is required to summon it at certain stated intervals. In some states (*e.g.*, Czechoslovakia) he is required to summon it upon demand of a certain number of its members.

In the former case the legislature assembles automatically, as it were, and opens its proceedings without the participation of the executive; in the latter, the formality of opening the session is a function of the executive or his representative, who performs the duty with more or less ceremony, such as the reading of a speech from the throne or the reading by the prime minister of a ministerial declaration outlining the policy of the cabinet, if it happens to be a new one. In the European monarchical countries the right of the executive to prorogue the sittings of the legislature, that is, to suspend the session to a certain date in the future, is generally provided for by constitutional provision, though in republics such a power is rarely recognized as belonging to the executive. In countries having the cabinet system of government the executive is usually invested also with the power of adjourning the legislature subject to certain limitations<sup>42</sup>.

In states having the presidential system of government the power of the executive is usually limited to adjourning the legislature only when the two chambers are unable to agree upon a time of adjourn-

<sup>41</sup> This is true, for example, in the United States, Germany, Chile, China, and Brazil. By the constitution of Czechoslovakia (Art. 28) it belongs to the president to summon parliament, but he is required to do so twice a year—in March and October. He may also prorogue and proclaim its sessions to be at an end. So in Poland he may convoke, open, adjourn, and close parliament subject to certain restrictions. The President of the United States does not possess the power of prorogation.

<sup>42</sup> But in the republic of Czechoslovakia the president has the power to prorogue the parliament for a period not exceeding one month and not more than once during the year. So the president of the French republic may adjourn parliament twice during the session, for a period not exceeding one month in each case.

ment. In all states having the cabinet form of government the executive is vested with the power of dissolving the legislature, or rather the popular chamber, that is, of terminating the mandates of the members and thus putting an end to the legal existence of the chamber. But generally the exercise of this power is subject to certain limitations. With a few unimportant exceptions it can be done only upon the advice of a responsible ministry, and in most instances the dissolution must be followed within a certain period by new elections and the convening of the new parliament. Theoretically, the British executive is not subject to any limitations regarding the ordering of new elections and the summoning of the new parliament, but practically the conditions of the British parliamentary system make it a necessity.<sup>43</sup>

In the republics of America where the presidential system of government prevails, generally the right of the executive to dissolve the legislature or either chamber of it is not recognized. There the mandates of members of the legislature are terminated only by the legal expiration of the terms for which they are chosen, or by resignation or expulsion.

The more direct participation of the executive in legislation consists in furnishing the legislature with information concerning the legislative needs of the country; in recommending measures for its consideration; sometimes, though rarely, in the initiation of legislative projects; in approving or disapproving its acts and in promulgating those which are approved.<sup>44</sup>

<sup>43</sup> In the German Empire the emperor was forbidden by the constitution to dissolve the Reichstag without the consent of the Bundesrat, and the dissolution had to be followed by new elections within sixty days and the assembling of the new Reichstag within ninety days. Under the present constitution the president may dissolve it, but only once for the same cause, and a new election must be held on the sixtieth day following the dissolution. In France the president is empowered to dissolve the Chamber of Deputies only with the consent of the Senate, but there are no express constitutional requirements as to the ordering of new elections or the convening of the newly elected chamber. The president of the Polish republic may dissolve the lower chamber only with the consent of three fifths of the members of the senate, which is itself automatically dissolved with the lower chamber. The president of Czechoslovakia may dissolve parliament subject to no restrictions whatever except that this power cannot be exercised during the last six months of his term.

<sup>44</sup> For a special study of this subject see a monograph by M. Henri Bosc, entitled "Le pouvoir législatif des présidents des Etats-Unis" (1905).

The wisdom of requiring the executive to furnish the legislature with information concerning the state of public affairs and of recommending legislation to meet the needs and conditions of the public service rests on the obvious fact that the executive, from the very nature of his office, must have more extensive sources of information in regard to domestic and foreign affairs than the legislature can be expected to possess. "The true workings of the laws," observed Judge Story, "the defects in the nature or arrangements of the general systems of trade, finance, and justice, and of the military, naval, and civil establishments are more readily seen and are more constantly under the view of the executive than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring, the President to lay before Congress all facts and information which may assist their deliberations, and enabling him at once to point out the evil and to suggest the remedy."<sup>43</sup>

**The Executive Veto.**—The most important power of the executive in connection with legislation arises from the almost universal practice of making his approval essential to the validity of the acts of the legislature. This power of the executive to disapprove acts of the legislature is popularly known as the "veto," or, as it was called by the writers of *The Federalist*, the president's "qualified negative."

In a few states, like Great Britain, the veto power is absolute and cannot be overcome by any vote of the legislature, however large. There, however, owing to the thorough-going development which the cabinet system has undergone, the power of disapproval has necessarily fallen into desuetude and will probably not be exercised again unless in very exceptional cases.<sup>44</sup> In the great majority of constitutions the veto power of the executive is qualified, that is to say, it may be overridden by the legislature, provided an extraordinary majority of the members, usually two thirds, concur in repassing the measure disapproved. In France, the veto of the executive is merely suspensive

<sup>43</sup> "Commentaries," vol. I, sec. 1561. See also Tucker's Blackstone, App. 343-345; and Rawle, "On the Constitution," ch. 16.

<sup>44</sup> The veto power of the crown has not, however, been lost disuse, for it is a "fundamental principle of the English constitution that the crown can lose no rights by its own negligence." Burgess, "Political Science and Constitutional Law," vol. II, p. 203. See also Lowell, "Government of England," vol. I, pp. 25-26, where the conditions under which the veto might still be employed are set forth.

n character, and can be exercised simply to compel reconsideration by the legislature of measures passed by it and disapproved by the president. "It is," says Esmein, "a preservative against possible abuses and dangers of the parliamentary initiative."<sup>17</sup> A repassage of the vetoed measure by an ordinary majority of the members makes it a valid law, notwithstanding the interposition of the executive veto. In fact the suspensive veto has never been exercised in France a single time since the establishment of the Third Republic and it may, therefore, be regarded as a dead letter. Since the cabinet system of government exists in France, there is not likely to be any occasion for the exercise by the president of the veto power.<sup>18</sup>

The principal purposes of the veto are to prevent hasty and ill-considered action by the legislature, and to furnish the executive with a means of defense against the encroachments of the legislature upon his constitutional powers.<sup>19</sup> Hamilton pointed out that there was a strong tendency—a tendency "almost irresistible" in republican governments—for the legislative authority to absorb every other. "The representatives of the people," he observed, "are sometimes inclined to fancy that they are the people themselves and to assert an imperious control over the other departments. As they commonly have the

<sup>17</sup> "Droit constitutionnel," p. 540.

<sup>18</sup> In Brazil the veto power of the president may be overridden by a two thirds vote of congress (Art. 37), as in the United States. It is the same in Chile (Art. 54). In Czechoslovakia the veto of the president can be overridden by a majority of 50 per cent of both houses or by a three-fifths majority of the chamber of deputies (Art. 48). In Finland it may be overcome by the vote of an absolute majority of the lower chamber (Art. 19). The new constitution of Austria apparently does not require the approval by the president of laws enacted by parliament. The new constitution of the German republic does not give the president the veto power as such, but if a law passed by parliament and submitted to him does not meet his approval, he may, before promulgating it, submit it to a popular referendum (Art. 73). In short, the veto power belongs to the electorate rather than to the president.

<sup>19</sup> Speaking of the veto power, Daniel Webster said, "It was vested in the President doubtless as a guard against hasty and inconsiderate legislation and against any acts inadvertently passed which might seem to encroach on the just authority of the other branches of the government." "Works," vol. I, p. 255. Compare also Burgess, who observes that "it ought to be employed chiefly to prevent encroachments by the legislature upon the constitutional prerogatives of the executive and to prevent unwise legislative changes in the existing means and measures of the administration." "Political Science and Constitutional Law," vol. II, p. 255.

people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the constitution."<sup>50</sup> A "mere parchment delineation" of the boundaries of the three departments, Hamilton went on to remark, is insufficient, and hence each must be furnished with "constitutional arms" for its own defense against the "depredations of the other."<sup>51</sup> Without the power of veto the executive might be gradually stripped of his authority and even annihilated by successive resolutions of the legislature. The possibility of this danger is all the greater in a country like the United States, where the executive has not the right of adjournment, of prorogation, or of dissolution.<sup>52</sup>

The veto power, continued Hamilton, not only serves as a "shield to the executive," but it furnishes an additional security against the enactment of unwise legislation and establishes a salutary check upon the evil effects of faction, precipitancy, and want of consideration.<sup>53</sup> Where, however, the constitutional rights of the executive are not involved, in short, where the difference of opinion between the executive and the legislature relates to the wisdom or expediency of the measure, the veto power should be used sparingly. A wise executive will be inclined not to set his own judgment against that of the legislature, but will yield to its views of public policy.<sup>54</sup>

To the argument sometimes advanced that the veto power of the executive may be employed to prevent the enactment of good laws as well as bad ones, it may be replied that the power cannot be effectually exercised if an extraordinary majority of the legislature are favorably disposed toward the law vetoed. Such an argument, said Hamilton, will have little weight with those who have a proper appreciation of the "mischiefs of that inconstancy and mutability in the laws which form the greater blemish in the character and genius of our governments. We should rather look with favor upon every device intended to restrain the evils of our legislation"<sup>55</sup>—evils which since Hamilton's day have certainly grown to be of the first

<sup>50</sup> *The Federalist*, No. 70. See also De Tocqueville, "Democracy in America," vol. I, p. 125.

<sup>51</sup> *The Federalist*, No. 73. See also Story, "Commentaries," vol. I, sec. 84; also Kent, "Commentaries," vol. I, lect. XI.

<sup>52</sup> Compare as to this Esmein, "Droit constitutionnel," p. 507.

<sup>53</sup> Compare Burgess *op. cit.* vol. II, p. 255.

<sup>54</sup> *The Federalist*, No. 73; see also Story, "Commentaries," vol. I, sec. 85.

magnitude. Where the veto power is qualified, that is, where the objection of the executive may be overcome by the legislature, a larger number than a bare majority concurring, the means is provided for enabling the executive to point out the defects of legislation submitted for his approval and of compelling a reconsideration by the legislature of its former action. In short, when exercised, it is in effect an appeal to the legislature itself and merely asks a revision of its own judgment.<sup>53</sup> Especially is this true in the United States, where the executive is obliged to state the reasons for his objections and where the legislature is required to reconsider measures vetoed.

**The Immunity of the Executive from Judicial Process.**—It may be laid down as a proposition of almost universal application that the chief executive cannot be subjected to control of the ordinary courts either for criminal or for political policies.

In the United States the President is responsible to but one body for his criminal acts, namely, the Senate organized as a court of impeachment—a court whose jurisdiction over the President is limited to removing him from office and disqualifying him from again holding public office. He cannot be arrested or in any manner restrained of his liberty or interfered with by the order of any court or compelled to obey any judicial process or to give evidence either by personal testimony or deposition in any court. The courts of the United States have uniformly declined to issue processes against him or to restrain him by injunction or in any way control his discretionary authority. The immunity of the President, however, from responsibility to the courts for his criminal acts ceases with the expiration of his term of office. As soon as he becomes a private citizen, the courts may take jurisdiction of his person and compel him to answer for his misconduct. Moreover, the courts have no scruples against inquiring into the legality of the orders and regulations issued by him and of declaring them null and void when in their opinion they are not authorized by the constitution or laws. Furthermore, the immunity enjoyed by the chief executive does not belong to his subordinates, not even the members of his cabinet. Over them the courts freely exercise control, and the orders of the President are no defense for violations of the constitution and laws by them. As the President

<sup>53</sup> Compare Story, *op. cit.*, vol. I, sec. 888.

acts for the most part through subordinates, the courts are thus enabled to restrain him from administering the government in violation of the constitution and the laws.

The exemption of the executive from the control of the courts has been criticized by some doctrinaires as a survival of the monarchical doctrine that "the king can do no wrong," and hence as being dangerous and inconsistent with the theories of republican government. Experience and reason, however, teach that the principle rests upon considerations of political necessity and sound public policy. It is impossible to subject the supreme head of the government to the control of the courts without impairing his independence, interfering with the discharge of his high duties, and destroying the unity of the executive power. To attempt it would lead to useless conflicts between the executive and the judiciary, since, controlling as he does the machinery of execution, he might successfully resist the execution of judicial process directed against him or pardon himself of any punishment which a court might attempt to inflict upon him. The experience of the past shows that the dangers prophesied from the personal independence of the executive are mostly imaginary, that they are, indeed, far less than those which would follow from subjecting him to the constant interference of the courts and exposing the people to the dangers of anarchy.<sup>56</sup>

**Methods by Which the President May be Removed from Office in Other Countries.**—In most other republics the immunity of the president and the procedure by which he may be removed from office are similar in principle to those in the United States. In France he may be impeached by the Chamber of Deputies, apparently for the crime of high treason only, and tried by the Senate constituted as a high court of justice. But singularly enough neither the constitution nor the statutes of France contain any definition of the crime of high treason or prescribe the punishment therefor. Does it belong to the Senate in these circumstances to determine whether the act for which the president has been impeached is high treason and to fix the punishment therefore in case it is so held? It is a principle of French criminal law (Art. 5 of the criminal code), expressly affirmed by the

<sup>56</sup> Compare Burgess, *op. cit.*, vol. II, pp. 246-247; and Finley and Sanderson, "The American Executive," p. 48.

Declaration of Rights in 1789 (Art. 8), that no one may be punished except in virtue of a law—that, in short, where there is no law, there is no penalty. No case has arisen in France involving the application of the constitutional provision relative to the trial of the president for treason.<sup>57</sup> In Chile the president may be impeached by the chamber of deputies during his term and for six months after its expiration for acts by which “the honor or security of the state may be gravely compromised or the constitution or laws openly infringed,” and tried before the senate, which may by a two-thirds majority pronounce him guilty, in which case he is automatically removed from office.<sup>58</sup>

The president of Brazil may be impeached by the chamber of deputies for both ordinary and official crimes;<sup>59</sup> for the former he is tried before the federal supreme court; for the latter, before the senate. The president of China is declared to be immune from criminal prosecution while in office, except that he may be impeached for treason by the house of representatives (by a two-thirds vote) and tried by the senate. If convicted by a two-thirds majority, he shall be “expelled from office” and may be further prosecuted before the supreme court.<sup>60</sup> The president of Austria may be impeached for violation of the federal constitution, by the two chambers in joint assembly, and tried before the supreme constitutional court. In case of conviction he forfeits his office and may in addition be temporarily deprived of his political rights.<sup>61</sup> The president of Czechoslovakia may be impeached (offenses not specified) by the chamber of deputies by a two-thirds majority and tried before the senate.<sup>62</sup> The president of Poland may be impeached by the lower chamber (by a three-fifths majority) for betraying the country, violating the constitution, and for criminal offenses, in which cases he is tried before the supreme court.<sup>63</sup>

<sup>57</sup> The whole matter is fully discussed by Esmein (*op. cit.*, 5th ed., pp. 796 ff.), who concludes that it belongs to the Senate to fix the punishment in case the president should be tried and convicted of treason by it. It may, therefore, remove him from office and impose any additional punishment it sees fit to impose.

<sup>58</sup> Const. 1925, Art. 39.

<sup>59</sup> Const., Art. 53. Official crimes include acts which threaten the political existence or security of the union, the constitution and form of government, the free exercise of political power, the “honesty of the administration,” etc.

<sup>60</sup> Const. 1923, Arts. 60, 63.

<sup>61</sup> Const. 1920, Art. 142.

<sup>62</sup> Const. 1921, Art. 34.

<sup>63</sup> Const. 1921, Art. 51.

The new constitution of Germany declares that the president shall not be subject to criminal prosecution (for ordinary crimes) without the consent of the Reichstag, but he may be impeached by the latter body (by a two-thirds majority) and tried before the supreme judicial court for "wrongful violation of the constitution or laws of the *Reich*."<sup>64</sup> Nothing is said, however, in regard to the punishment which the court may inflict in case he is found guilty. It was probably the intention of the authors of the constitution that this should be regulated by statute.

**Existing Methods Evaluated.**—Such are the usual methods by which the chief executives of republican states may be removed from office. The general principle is the same everywhere, except that the body which hears the charges and renders the decision is in some states the upper chamber of the legislature while in others it is the supreme court. Each has its advantages and disadvantages. Trial by a legislative chamber means trial by a political assembly, and the requirement of an extraordinary vote to convict does not necessarily insure the accused against conviction for political reasons. Trial by the supreme court affords greater assurance that the decision will be unaffected by political considerations, but it has the disadvantage of throwing upon the court the doubtful task of deciding what may in fact be a political rather than a strictly judicial question. On the whole, the latter method would seem to be preferable.

**Popular Recall of the German President.**—In one respect the situation of the president of the German republic differs from that of all other republican chiefs of state. He may be recalled before the expiration of his term by a vote of the people. By a two-thirds vote of the Reichstag the question of his removal may be submitted to a popular referendum, and when such a resolution has been passed, the president is automatically suspended from office pending the verdict of the electorate. The president may prevent the Reichstag from taking such action, through his power of dissolution, but in that case he would be under the necessity of obtaining the counter-signature of the chancellor to the decree of dissolution, and since the chancellor is responsible to the Reichstag, it is doubtful whether it could be obtained. The Reichstag, however, is deterred from taking

<sup>64</sup> Arts. 43, 59.

action looking to the recall of the president, unless it is reasonably certain that its proposal for his recall will be approved by the electorate, since by the terms of the constitution a negative vote will have the effect of automatically dissolving the Reichstag. The effect of a popular verdict favorable to the president also amounts to a re-election of him, presumably for a full term of seven years.<sup>65</sup>

**Power of the French Parliament to Force the Resignation of the President.**—The situation of the French president, in practice, is still more precarious in respect to his tenure. Although, by the constitution he is elected for a term of seven years and can be removed only by impeachment and conviction for treason by the Senate, it is now apparently established by precedent that he may be forced by the hostile attitude of parliament to resign before the expiration of his term. Grévy's resignation was demanded by parliament and he complied with the demand. More recently still Millerand was compelled to do likewise by the refusal of parliament to give its confidence to any ministry appointed by him, with the avowed purpose of compelling him to resign. He and his supporters vigorously protested that the action of parliament in thus compelling him to abandon his office before the legal expiration of his term was a violation of the constitution, but the protest was without effect.<sup>66</sup>

## VI. TYPES OF REPUBLICAN EXECUTIVES

**The Presidency of the United States.**—If we leave aside the Swiss executive, which is *sui generis* because of its collegial organization and its peculiar relation to the legislature, the existing executives of republican states fall into three fairly well differentiated classes.—American, French, and German. The American type includes the presidency and governorships of the United States and the presidencies

<sup>65</sup> Art. 43.

<sup>66</sup> The facts relative to the forced resignation of M. Millerand are set forth in the *Revue du droit public et de la science politique*, 1924, pp. 242 and 433. Duguit, the leading authority on French constitutional law, maintains, rightly it would seem, that the action of the Chamber of Deputies in thus compelling the president to resign before the expiration of his term was contrary to the letter and spirit of the constitution which provides that he may be removed only for treason and then only when he has been tried and convicted by the Senate. "Traité de droit constitutionnel" (2d ed., 1924), vol. IV, p. 557.

of the Latin-American states, which have imitated the example of the United States. The characteristic features of the office in these countries is, as already pointed out, the chief executive's almost complete independence of the legislature, in respect to his mode of election, his tenure, the sources of his power, and the manner in which he exercises the authority conferred upon him by the constitution or which, as is sometimes contended, may be regarded as inherent in the nature of his office.<sup>67</sup> His position is one of almost absolute irresponsibility to the legislature in respect to his political acts and policies, and, as pointed out in an earlier chapter, his responsibility to the electorate which chooses him is one which is practically unenforceable. Unlike the presidents of cabinet-governed republics, the presidents of the American republics (except of course the few like Chile, which have the cabinet system) actually exercise, subject to no direct control by the legislature, the powers which the constitution confers upon them; and the same is true of the governors of states in the United States.

Lord Bryce once remarked that the presidency of the United States was generally recognized to be the greatest political office in the world. The office has often been characterized as monarchial in character because of the actual irresponsibility of the incumbent either to the people or their legislative representatives.<sup>68</sup> The late

<sup>67</sup> Whether the President of the United States has any inherent power aside from that which is conferred upon him by the constitution and laws has been the subject of much discussion. The Supreme Court in the Neagle case (135 U. S. 1) apparently was inclined to the affirmative view. President Roosevelt evidently acted on the theory that the President has such power, and he expressed the opinion that the President is the "steward of the people" and as such it is not only his right but his duty "to do anything that the needs of the nation demand, unless such action is forbidden by the constitution or the laws." See his "Autobiography," pp. 371, 479, and 524. But ex-President Taft has expressed the contrary view. "The true view of the executive function is," he said, "that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and include within such express grant as proper and necessary to its exercise. . . . There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest." See his "Our Chief Magistrate and his Powers," pp. 139-140. See also the discussion by Willoughby in his "Constitutional Law of the United States," vol. II, pp. 1152 ff.

<sup>68</sup> Secretary of State Seward is reported to have said to a European diplomat, "The difference between you and us is that you choose a king for life while we elect one every four years and give him absolute power within certain limits,

President Wilson pointed out that in the hands of a strong man, unafraid of responsibility and having the gift of leadership, the power and influence of the office are nearly unlimited. He himself attributed to the President a triple rôle: first, that of executive or administrative head of the government—the legal or constitutional rôle; second, that of leader of his political party; and third, the guide and leader of the nation in legislation. As leader of his party, according to Mr. Wilson, it belongs to the President to exercise a dominant rôle in the formulation of the party program, and since he alone of those who represent the country is chosen by it as a whole, he alone can be properly regarded as the spokesman of the country,—it belongs to him to assume the leadership in bringing about the enactment into laws of the measures in favor of which the nation has pronounced.<sup>69</sup> To this end he is not limited to making perfunctory recommendations to Congress and occasionally vetoing a bill which he disapproves, but may intervene personally with leading members by argument and persuasion, refuse to accept the recommendations of recalcitrant or hostile members for appointments, may make direct appeals to public opinion and in other ways employ pressure and use the whip hand to cause Congress to give effect to the policies and measures which he advocates.<sup>70</sup> Mr. Wilson and some other Presidents before him were able to carry out this theory of executive leadership with some success, but it has naturally found vigorous

which after all he can interpret for himself." An ex-President, Hayes, said: "Practically, the President holds the nation in his hands." Professor Ford remarks: "The truth is, in the Presidential office, American democracy has revived the oldest political institution of the race: the elective kingship." And he added that "authority which early Presidents would not have ventured to assume is now regarded as belonging to the ordinary functions of the office." Ex-President Taft remarks (*op. cit.*, p. 9) that he was often introduced to audiences as one who exercised greater power than any European monarch.

<sup>69</sup> Ex-President Taft (*op. cit.*, p. 18) also emphasizes that the President, by reason of the fact that his constituency is the electorate of the whole United States, is much freer from local influences and in consequence sometimes represents more truly the sentiment of the country than does the Senate or House of Representatives.

<sup>70</sup> His views are set forth particularly in his "Constitutional Government in the United States," ch. 3. They are summarized in my article, "Woodrow Wilson's Ideas of the Presidency," *Review of Reviews*, March, 1913.

opponents, and in practice most Presidents have acted upon the negative principle that the leadership in legislation properly belongs to Congress and not to the President.<sup>71</sup>

**The Presidency of the French Republic.**—The presidential office in France represents the antithesis of the type described above. The French constitution is most generous in the extent of the powers which it confers upon the president. With the exception of the veto it gives him virtually all the powers that are conferred by the constitution of the United States upon the American president and in addition other powers which commonly belong to kings, such as the power to convoke, prorogue, and adjourn the parliament, to dissolve the Chamber of Deputies (with the consent of the Senate), to introduce bills in parliament, to appoint *commissaires* to appear therein to give information and explanations, to create new offices, and to make appropriations of money from the treasury during the recess of parliament to meet unforeseen emergencies, etc. The national assembly which framed the constitution apparently believed that it was creating an office of great power, one which would be independent of parliament, and for this very reason it was attacked by the republicans as inconsistent with true republicanism and even dangerous.<sup>72</sup> It turned out, however, that the fears of the republicans were unnecessary. After enumerating the powers of the president the constitution proceeded to paralyze him—to imprison him in an

<sup>71</sup> Mr. Charles E. Hughes in his campaign for the presidency in 1912 attacked the Wilson theory of executive leadership in legislation as being contrary to the spirit if not the letter of the constitution. During the World War when the domination of the President reached its height, his "dictatorship" was occasionally the object of vigorous attack, especially by Republican senators. One of them, Mr. Works of California, said: "Never in the entire history of the country has the President so completely and defiantly usurped the lawmaking powers of the government and dictated and forced the course of Congress. . . . Members of Congress have, under the lash of executive and party domination, surrendered their conscientious convictions and voted against their own sentiments of right and justice. We have on the statute books to-day not one but many enactments that are the laws of a dictator and not the free and voluntary acts of the Congress." *Congressional Record*, Jan. 5, 1917, vol. LIV, pt. I, p. 865.

<sup>72</sup> Compare Barthélemy, "Le rôle du pouvoir exécutif dans les républiques modernes," p. 642. On Feb. 12, 1875, when an agreement had been reached regarding the powers of the president, Gambetta, addressing the Right, said, "We (the republicans) have consented to give you an executive the strongest that has ever been set up in an elective democratic country—we have given you all, abandoned all." (Loud applause on the Left.)

iron cage, as some French writers have characterized it—by the addition of a brief clause which states that “every act of the president must be countersigned by a minister.” All official acts by the president—appointments, dismissals, introduction of bills in parliament and the others—are in the form of decrees each of which must be signed by a minister who is responsible, not to the president but to the parliament, for the consequence of his signature. Thus the president was placed under the guardianship of the ministers who are in turn dependent upon parliament. As a result, he can perform no official act which in the opinion of the ministers parliament would not approve. He is, therefore, a dependency of parliament and it is parliament, not the president, who really governs.

Commentators on the French constitution are accustomed to say that the only power conferred by the constitution upon him which he can exercise freely and without the necessity of obtaining the consent of a minister is to “preside over national festivals.” To this, Casimir-Perier, who resigned the office in a spirit of some disgust after having occupied it for only six months, added the power of the president to send his resignation to parliament. The president, he said, was little more than an automaton and the record of his official acts consists of nothing but an autograph collection.

As stated above, the president is not only in large degree a figurehead, but it is now established by precedent that the parliament may whenever it sees fit compel him to resign. Aside from the conditions of the parliamentary system, which necessarily reduce the rôle of the president to a minimum, the mediocre, negative character of many of the men who have occupied the office has contributed to its enfeeblement. When Grévy became president after the resignation of MacMahon in 1879, he expressed the view that the office was intended to “afford an honorable retirement for weary veterans of long political struggles,” and that the duty of the president was to give advice, to efface himself, and not to act. His own course as president was strictly in accord with that conception. Some of his successors, notably Loubet and Fallières, imitated his example. The former, at the first meeting of his cabinet, outlined the impersonal negative rôle which he actually played. “I shall advise you,” he said, “and at times criticize, but there will be no Elysée policy.” Several presidents with strong personalities have wished to exercise independently the powers

which the constitution confers upon them and to play a more active rôle in the government of the country. Casimir-Perier even announced at the time of his election his intention "not to neglect" the exercise of these powers, but he found it impossible in view of the attitude which the parliament then took and has always taken in regard to its own right to govern. He resigned six months after his election and years afterwards (1905) in a letter to the *Temps* he described the president as an automaton without power, condemned to play the undignified rôle of signing whatever documents the ministers laid before him. Poincaré entertained the same view of the presidential office and he too desired to play a more important part in the government of the country, and it must be admitted that in the field of foreign relations at least he achieved some success.<sup>73</sup> When Millerand became president in 1920, he made known in no uncertain and not altogether tactful language his intention to do what he could to have the actual powers of the French president extended—by constitutional amendment if necessary—so as to enable him to play somewhat the same rôle as the President of the United States does. He also intimated that his ministers, although responsible to parliament, would be expected to accept his own views of public policy.<sup>74</sup> These utterances, which were regarded as being in violation of the constitution, coupled with his taking sides with the Nationalist party in the parliamentary

<sup>73</sup> In his message of Feb. 20, 1913, to the Chamber he declared that "the weakening of the executive power is neither the wish of the chamber nor that of the country. Without a firm and far-seeing executive authority, the efficient functioning of the administrative services would speedily risk being compromised and at certain times the public business would be menaced. During the whole of my magistracy, I will take care, in collaboration with the responsible ministers, that the government of the republic will keep intact, under the control of parliament, the authority which must belong to it." Jœzé, "La présidence de la république," *Rivue du droit pub. et de la sci. politique*, 1913, p. 125. Poincaré was president of the council and minister of foreign affairs at the time of his election as president of the republic. When he became president, he continued to be foreign minister in fact though not in law or name, and he imposed on his ministers the same policy which he had followed when he was himself prime minister. At the same time he was able in an unusual degree to command the support of parliament. Under these circumstances he exerted an influence upon the conduct of foreign affairs such as few French presidents have done. Compare Rogers, "The French President and Foreign Affairs," *Pol. Sci. Quar.*, vol. XI. (1925), p. 551.

<sup>74</sup> As to this see Barclay, in *The Nineteenth Century* for November, 1920, and Huddleston, in *New Europe*, October 14, 1920.

elections of 1924, which also was regarded as being in conflict with the spirit of the constitution, were the chief reasons which caused parliament to force his resignation in 1924. Doumergue, his successor, announced that his own policy would be that of an impartial neutral and that he would bow to the will of parliament. Like Grévy, Loubet, and Fallières, he was little more than a ceremonial figurehead. Considering that parliament has refused to regard the president as a co-equal collaborator, has insisted upon controlling him, and has compelled those who have attempted to exercise the powers which the constitution gives them, to resign, it is hard to see how the president of the French republic can ever be more than what he has often been described by French writers: "a prisoners in a iron cage," a "mute idol in a pagoda," a mere "dummy," a "useless symbol to please the people," the "emaciated shadow of a *roi-fainéant*," etc.<sup>75</sup>

The question has often been discussed in France as to the necessity or utility of such an office. For a long time its abolition was demanded by the Radical and Socialist parties, one of its leading advocates being Clemenceau (who, however, in 1921 was a leading and active candidate for the office). There may be some excuse, they argued, for a hereditary figurehead in a monarchy, but there is no place for an elective one in a republic. Aside from the selection of the prime minister when a new cabinet is to be appointed—a function which might very well be discharged by the parliament itself or by a committee of parliament,—the actual rôle of the president is ceremonial and decorative: presiding on the occasion of national fêtes, attending inaugurations of various kinds, including the races and the annual military review at Longchamps, opening expositions, conferring decoration, awarding the grand prize, entertaining distinguished personages, and the like.

<sup>75</sup> Sir Henry Maine, comparing the president of the French republic with the former kings of France and the president of the United States, said: "There is no living functionary who occupies a more pitiable position than a French president. The old kings of France reigned and governed. The constitutional king, according to M. Thiers, reigns, but does not govern. The president of the United States governs, but he does not reign. It has been reserved for the president of the French neither to reign nor yet to govern." J. J. Weiss, a well-known French journalist, parodizing Thiers's definition of the rôle of a constitutional king, and having in mind the president's hunting parties at Rambouillet, remarked that "the fundamental principle of the constitution is or ought to be that the president chases rabbits but does not govern."

Nevertheless, the great majority of Frenchmen believe that a "chief of state" of some kind, an exalted functionary to represent the state in its international relations, to receive diplomatic representatives from foreign states, and to personify the majesty of the republic, is desirable. Such a person, moreover, if he is esteemed and respected abroad, is capable of exerting a valuable influence in the conduct of the foreign relations of the country, especially in concluding alliances and understandings with the heads of other states, as the examples of Faure, Carnot, and Poincaré showed. Parliament would doubtless tolerate positive action of the president in this field—if it were not partisan or unduly open.<sup>76</sup>

Finally, the presidency has its value as a "magistracy of influence," as Barthélémy characterizes it.<sup>77</sup> Prévost-Paradol once described the president as a *surveillant-générale* of the state. If he is a strong, popularly esteemed, impartial leader, he will be able to exert a moral authority and a moderating influence in a country where party passions are strong, which will be wholesome and valuable.<sup>78</sup>

**The Presidency of the German Republic.**—The presidential office in Germany, from 1919 to 1934, differed from the American and French models. The president of the German republic was neither a powerful functionary such as the president of the United States nor a figurehead like the president of France. He occupied a position and played a rôle of an intermediate character somewhere between the two, although approximating more nearly that of France, for the reason that Germany, like France, had the cabinet system of government, which necessarily limited the rôle of the titular head of the state. Among the framers of the German constitution the Independent Socialists were opposed to the creation of the office of president on the ground that if the titulary of the office were vested

<sup>76</sup> As to this compare Rogers, "The French President and Foreign Affairs," *Pol. Sci. Quar.*, vol. XL (1925), pp. 540 ff.

<sup>77</sup> "Le rôle du pouvoir exécutif dans les républiques modernes," p. 709.

<sup>78</sup> I have discussed and evaluated the French presidency in an article entitled, "The Presidency of the French Republic," in the *North American Review* for March, 1913, pp. 335 ff. See also article by M. Stephen Lausanne with the same title, *ibid.*, April, 1920; Rogers, articles cited above; Barthélémy, *op. cit.*, pp. 626 ff.; Levret, "Le président de la république" (1913); also his "Le gouvernement et le parlement" (1919); Lubersac, "Les pouvoirs constitutionnels du président de la république" (1913), and Hereshoff-Bartlett, "The Presidency of the French Republic," *Law Quarterly Review*, vol. XXXII (1916), pp. 290 ff.

with the actual exercise of power as in the United States, Germany would be no better off than she was under the monarchy. On the other hand, if a genuine cabinet system were established under which the government would be carried on by ministers responsible to parliament, the president would be limited to playing a purely ornamental rôle, which in the opinion of the Independents was not worth the cost. The Prussian, Badenese, and Bavarian republics had decided to give up the luxury of a titular chief executive and to rely upon ministries, and the *Reich* should follow their example. A large majority of the members of the national assembly, however, were in favor of a president of some sort. They might, therefore, choose between the three existing types : the Swiss, the American, and the French. But not one of these commended itself to the assembly : the Swiss type because it was collegial in organization, the American type because it was regarded as autocratic and dangerous, the French because it did not comport with the German conception of a strong executive power. The Germans had no taste for figureheads. Germany, it was argued, must have a strong president who not only would worthily represent and personify the majesty of the state, but also would act as a counterbalance to a parliament which might otherwise become omnipotent and dangerous. The office finally agreed on was a compound which embodied certain features of both the American and the French conceptions.<sup>79</sup> The American principle that the executive organ should be coördinate with the legislative organ was adopted, and this involved the rejection of the French principle of the election of the president by the legislature, which, as French experience had demonstrated, reduced the president to the position of a dependency of the legislature. On the other hand, the French principle of ministerial responsibility to parliament, coupled with the political irresponsibility of the president, was introduced. But to insure that the president would not be reduced to the rôle of a figurehead, his position as head of the state was strengthened by provision for his election by the people as in the

<sup>79</sup> What the assembly did is thus described by Oppenheimer in his "The Constitution of the German Republic," p. 74; "The wizards of the constitution threw into the boiling cauldron the most precious extracts collected in foreign lands, mixed the ingredients with characteristic disregard of chemical and physiological incompatibilities, stirred up the brew, added one ounce each of native suspicion and homegrown distrust, and outstepped that strangest homunculus, the President of the Federation."

United States. Thus, while the Germans preferred a system of parliamentary government, they preferred a parliamentarism whose mechanism was controlled not by the legislature but by the people.<sup>80</sup> They also preferred a system in which the ministry alone, and not the president also, as is virtually the case in France, should be responsible to the legislature. More logical, democratically, than the United States, they also provided for the popular recall of the president. Much larger powers were also conferred upon him, especially in respect to legislation, than are conferred upon the president of France. Thus, although he was not given the power of veto such as belongs to the President of the United States, he might, if he disapproved a bill passed by the Reichstag, submit it to a popular referendum. He was not, therefore, obliged as the president of France is to promulgate it when it did not meet his approval. Likewise, in case there was a disagreement between the two chambers over a bill, the president could submit the issue to a referendum. Article 48 gave him power to declare a state of siege, suspend various constitutional rights of the citizen, and to govern virtually as a dictator, a power which was actually exercised more than once, whereas in France a state of siege can be declared only by parliament. The president was also given the power to dissolve the lower chamber, whereas in France this power can be exercised by the president only with the consent of the senate. It is true that the president's acts required for their validity the countersignature of the chancellor or some other minister, who was himself responsible to the Reichstag—a requirement which so far as it relates to the power of dissolution was vigorously opposed by the parties of the Right in the National Assembly, on the ground, as they argued, that the president would never be able to obtain the counter-signature of a minister to the dissolution of a chamber of which he was himself a member and to which he was responsible. The right of the president in case of a conflict between him and the chamber to dissolve the chamber and appeal to the people ought not, they said, be dependent upon the will of the chamber itself. Preuss, the principal author of the constitution, however, insisted upon the necessity of the counter-signature. He argued that if the president and the ministry were in agreement, the counter-

<sup>80</sup> Compare Brunet, "The German Constitution," p. 154.

signature could be easily obtained; if the ministry were opposed to dissolution or a referendum, it would resign and the president would find a new chancellor who would give his signature.<sup>81</sup>

Notwithstanding the necessity which the president was under of obtaining ministerial approval of his acts, as in France, his dependence upon parliament was considerably less than is that of the French president, and it was possible for him to exercise his constitutional powers with greater freedom from parliamentary control. It was clearly the intention of the authors of the constitution that the Reichstag should be given full political control over the government without meddling with the details of administration, as the French parliament so often does, and in fact a proposal made in the national assembly to give the Reichstag power to issue binding directions to the government was rejected.<sup>82</sup> It was not possible for the parliament to reduce him to subjection and compel him to resign as the French parliament may do. If there was an irreconcilable conflict between him and the parliament, he could submit the conflict to the people for decision, and if the parliament desired his resignation, its proposal for his recall, which could be made only by a two-thirds majority, had to be submitted to the people for their decision. In this respect his independence of parliamentary control was much greater than is that of the French president, who can be forced to resign by the vote of a simple majority of the Chamber of Deputies. As already stated, the fact that he derived his office from popular election insured him, certainly if he was a popular and highly esteemed chief magistrate, a position of strength and influence which the French president, elected as he is by parliament, can never be sure of.

These arrangements were greatly altered in 1933 and 1934 by the Hitler dictatorship. The ministry was empowered to legislate without

<sup>81</sup> Compare Brunet, *op. cit.*, 166 ff.; Rogers, "The Powers of the German President," *New York Times*, May 3, 1925, and Freund, "The New German Constitution," *Pol. Sci. Quar.*, vol. XXXV (1920), p. 186. Professor Freund expresses the opinion that the president should have been permitted on his own responsibility, without the necessity of a counter-signature, to appeal from the ministers and the parliament to the ultimate source of authority—the people. Such a power, purely arbitral in character as it is, would not be inconsistent with the guardianship of the constitution and it would make the presidency a more democratic institution.

<sup>82</sup> Freund article cited, p. 187.

the approval of the parliament, and in practice the president was reduced to the rôle of a figurehead. Finally, in August, 1934, following the death of President von Hindenburg, the powers and duties of the office were added to those of the chancellor, Adolf Hitler, who was to combine in his person both offices. Whether the office of president will ever be separated again from the chancellorship, or whether both will be replaced by a king or emperor, is a matter on which it would be unsafe to make a prediction.

## CHAPTER XXIV

### THE JUDICIARY

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## I. RÔLE AND FUNCTIONS OF THE JUDICIARY

**Early Notions of Justice.**—The administration of justice, the chief task of the judiciary, to-day universally a function belonging exclusively to the state. But it has not always been so. In early times the state lacked judicial organs and, indeed, the administration of justice was not regarded as a function of the state. The first notion of

justice was found in the idea of revenge or retaliation, which was the recognized right of the individual victim of a wrong or that of his friends and relatives. It first took the form of the "blood-feud" and later the milder form of the "wer" or money payment as compensation for the injury inflicted. This was the remedy in the case of purely private offenses. There was, however, no executive machinery by which the payment or acceptance of the "wer" could be enforced against the wrongdoer or the victim. For offenses so gross that they outraged the moral sense of the community, the drastic remedy of expulsion from the community was resorted to. These were the so-called "bootless" crimes for which a money payment could not atone.

**Administration of Justice Becomes a State Function.**—In the course of time the king came to the aid of the clan by compelling the avenger to accept the "wer" and the offender to pay it. Likewise he assumed the responsibility for the punishment of bootless crimes, which were regarded as offenses against himself.

In time there developed the idea of the "king's peace," and the notion that any offense which involved disorder or violence was an attack upon that peace to which the king could not be indifferent. The idea finds expression to-day in the form of indictments which in England read: "Against the peace of our Sovereign Lord the King." Gradually, the notion of the "king's peace" was extended to embrace offenses, such as theft, which did not normally involve disorder or violence against himself. This marked the beginning of the idea that crime is an offense not merely against the individual victim but also against the state and that it belonged to the state to see that it was properly punished. For a long time, however, the state was unable to make good its claim to what is now recognized as an exclusively state function. It had formidable rivals in the clan, the feudal lords, and the church, each of which claimed and exercised the right to administer justice in certain cases. With the development of the royal power and the consolidation of national states these rivals were ultimately overcome and they lost the power of administering justice, which passed to the state. Until a comparatively recent date, however, remnants of feudal justice survived in some of the continental European states, notably in Germany, and in England where the church courts exercised civil jurisdiction in certain cases until far into the nineteenth

century. To-day the transformation is complete in all modern states and the administration of justice, as stated above, is an exclusive function of the state.<sup>1</sup>

**Necessity of Judicial Organs.**—Considering that one of the primary objects for which the state was established was the creation and protection of individual rights, the necessity of a judicial organ or organs as the means through which this object might be accomplished has been recognized from early times. A society without legislative organs is conceivable, and, indeed, fully developed legislative organs did not make their appearance in the life of the state until modern times, but a civilized state without judicial organs and machinery is hardly conceivable. In the absence of legislative organs the courts might apply rules derived from other sources, for example, from their own previous decisions or from custom, as they did in fact, in many early communities,<sup>2</sup> but it is impossible to imagine any satisfactory substitute for courts of justice. "It is indispensable," said an eminent American jurist, "that there should be a judicial department to ascertain and decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation."<sup>3</sup> "Where there is no judicial department to interpret and execute the law, to decide controversies, and to enforce rights, the government must either perish," said Chancellor Kent, "by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty."<sup>4</sup> Not only are judicial organs a necessity but, as Lord Bryce remarked, there is

<sup>1</sup> The early notions and methods of justice and the processes by which the transformation described above took place are luminously explained by Jenks in his "Law and Politics in the Middle Ages" (1898), ch. 4. See also his "History of Politics" (1900), ch. 11.

<sup>2</sup> Compare Gray, "Nature and Sources of Law," p. 145. Professor Gray observes (p. 101) that if "every member of the state knew perfectly his own rights and duties and the rights and duties of everybody else, the state would need no judicial organs; administrative organs would suffice. To determine, in actual life, what are the rights and duties of the state and of its citizens, the state needs and establishes judicial organs." But would mere knowledge of the citizen of his own rights and duties and those of his fellow citizens render unnecessary the existence of judicial tribunals? It may be doubted.

<sup>3</sup> Rawle, "On the Constitution," ch. 21. Compare also Baldwin, "The American Judiciary," p. 3.

<sup>4</sup> "Commentaries," lect. XIV.

no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than the feeling that he can rely on the certain and prompt administration of justice. "If the law be dishonestly administered, the salt has lost its flavor; if it be weakly or fitfully enforced, the guarantees of order fail, for it is more by the certainty than by the severity of punishment that offenders are repressed. If the lamp of justice goes out in darkness, how great is that darkness!"<sup>5</sup>

**Non-Judicial Functions of the Courts.**—Judicial tribunals are usually thought of as agencies for the adjudication of civil controversies between individuals and between them and the state and for the trial of persons accused of crime. This is undoubtedly their chief function, but it is not their whole function. In practice they perform a variety of miscellaneous duties which are not strictly judicial in character. Thus they frequently, in America at least, appoint certain local officials, choose their own clerical and other functionaries, grant licenses, appoint guardians and trustees, admit wills to probate, administer the estates of deceased persons, appoint receivers of railroads which are unable to meet their financial obligations, etc. More important still, they issue injunctions to prevent the commission of wrong and injury (preventive adjudication) and writs of various kinds such as mandamuses to compel public officers to perform their legal duties and injunctions to restrain them from doing what the law forbids.

**Declaratory Judgments.**—They not only decide specific controversies which come before them in the form of actions or suits, but in some countries, notably England, they frequently pronounce what are called "declaratory judgments," that is, declarations of what is right or what the law requires when such opinions are requested by interested parties, without the necessity of going through the form of the trial of a specific case.<sup>6</sup> This function of the courts has not been generally introduced in the United States, but there is at present con-

<sup>5</sup> "Modern Democracies," vol. II, p. 384.

<sup>6</sup> A list of cases in which the British courts have granted declaratory relief may be found in the American Bar Assoc. Reps., vol. 48, pp. 327 ff. See also Sunderland, "A Modern Evolution in Remedial Rights—the Declaratory Judgment," *Mich. Law Rev.*, vol. XVI, pp. 69 ff.

siderable demand for it, and recently a number of states have provided for it by legislation.<sup>7</sup> A uniform act drafted by the National Conference of Commissioners of Uniform State Laws in 1922 for this purpose has been adopted by a few states.<sup>8</sup> It is regrettable that American lawyers generally have been slow to admit the competence of the courts to pronounce judgments except in litigated cases or controversies which come before them in the usual course.

**Advisory Opinions.**—A somewhat similar function of the courts, exercised in many countries, is that of giving advisory opinions on questions of law when requested by the executive or the legislature. In England, as is well known, the crown may and not infrequently does call upon the Judicial Committee of the Privy Council for its opinion and advice upon questions of law, and it is settled that the House of Lords when exercising its function as the supreme court of appeal may request the opinions of any of the judges.<sup>9</sup> In Canada the Supreme Court is charged with giving advisory opinions on questions of law to the governor in council and thirty such opinions are said to have been given since its establishment in 1875. In most of the Canadian provinces the highest courts are charged with a similar function. In Austria, Bulgaria, Colombia, Costa Rica, Panama, Salvador, and Sweden the principle of the advisory opinion in one form or another is found. In at least thirteen states of the American union it is likewise found. In Massachusetts, New Hampshire, Maine, and Rhode Islands it has existed from the first, and the Supreme Court of Massachusetts has given some one hundred and fifty advisory opinions either to the governor or to the legislature since 1780.<sup>10</sup>

<sup>7</sup> See the list given by Hudson in *Harv. Law Rev.*, vol. XXXVII (1914), p. 972.

<sup>8</sup> See Borchard, "The Uniform Act on Declaratory Judgments," *Harv. Law Rev.*, vol. XXXIV, p. 697.

<sup>9</sup> See Van Vechten Veeder, "Advisory Opinions of the Judges of England," *Harv. Law Rev.*, vol. XIII, pp. 358 ff.

<sup>10</sup> The whole subject of advisory judicial opinions is fully discussed by Ellingwood, "Departmental Coöperation in State Government" (1918), and by Professor Manley Hudson in an article entitled "Advisory Opinions of National and International Courts," *Harv. Law Rev.*, vol. XXXVII (1924), pp. 970 ff. See also his pamphlet, "The Advisory Opinions of the Permanent Court of International Justice," *International Conciliation*, Nov., 1925, No. 274 (Carnegie Endowment for International Peace). See also Thayer, "Legal Essays," pp. 42 ff.; Dubuque, "The Duty of Judges as Constitutional Advisors," *Amer. Law Rev.*,

When the constitution of the United States was being framed, a proposal was made that each house of Congress as well as the President should have authority to require the opinions of the Supreme Court upon important questions of law and upon solemn occasions, but it was not adopted. As is well known, President Washington in 1793, with the approval of the cabinet, requested the opinion of the court on twenty-nine questions relative to the obligations of the United States to France under the treaty of alliance of 1778, but the court, doubting the propriety of giving opinions in cases not actually before it for decision, declined to comply with the request and the precedent thus set has never been departed from.<sup>11</sup>

The preponderance of opinion of American lawyers is hostile to the idea of advisory opinions, on the ground that the giving of such opinions is not an appropriate judicial function.<sup>12</sup> But eminent American authority to the contrary is not lacking.<sup>13</sup>

**Right of the Courts to Declare Acts of the Legislature Unconstitutional.**—An extraordinary function exercised by the courts of some countries, either in pursuance of authority expressly conferred by the constitution or assumed by them as inherent in or incidental to the judicial power, is that of passing upon the constitutionality of statutes enacted by the legislature and of refusing to give effect to those which are contrary to the constitution, or which, as it is commonly said in Europe, are *ultra vires* or in excess of the authority of the legislature which enacted them. As is well known, this so-called

vol. XXIV, 269 ff., and Grinnell, "Duty of the Court to Give Advisory Opinions," *Mass. Law Quar. Rev.*, vol. II, pp. 54? fl.

<sup>11</sup> The questions are listed in Sparks, "Life of Washington," vol. X, appendix, p. 542. See also Warren, "The Supreme Court in United States History," vol. I, pp. 108 ff. Mr. Warren remarks that the impression was prevalent at the time that the President had the right to seek the opinion of the court on questions of law. Proposals have recently been made that the President should be given such a power if he does not already have it. See an address by Hon. James M. Beck before the Pennsylvania Society of New York on December 20, 1924, and an article by Professor W. A. Anderson in the *New York Times* of April 6, 1924. But the proposals were criticized by various jurists.

<sup>12</sup> Mr. Elihu Root, as a member of the Advisory Committee of jurists which prepared the draft of the statute of the Permanent Court of International Justice, characterized the practice as "a violation of all juridical principles, and Judge John Bassett Moore, a member of the court, pronounced it to be "obviously not a judicial function."

<sup>13</sup> See the articles of Professor Tiedson cited above.

doctrine of the unconstitutionality of statutes and the power of the courts to enforce it originated in the United States, where it has been followed by both federal and state courts from the beginning.

**Early American Practice.**—As early as 1780 the highest court of New Jersey laid down the doctrine and acted upon it in refusing to enforce an act of the state legislature.<sup>14</sup> Six years later the principle was announced and followed by the highest court of Rhode Island in a noted case,<sup>15</sup> and shortly thereafter by the courts of North Carolina and Virginia. Neither the federal constitution nor any of the state constitutions expressly recognize or sanction the principle ; yet it has always been considered a part of state and federal jurisprudence, and both the state and the federal courts have without exception acted in accordance therewith, and their action has received the general acquiescence of the people. Indeed, as Dicey observes, it is considered not only the right, but the duty, of every judge in the United States to treat as void any enactment which violates the constitution.<sup>16</sup> It was asserted to be a right and duty by a federal judge for the first time in 1795, when, in charging a jury, he said : "I take it to be a clear position that if a legislative act oppugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that in such a case it will be the duty of the court to adhere to the constitution and to declare the act null and void."<sup>17</sup> In 1803 the United States Supreme Court, in the celebrated case of *Marbury v. Madison*,<sup>18</sup> first acted upon the principle by holding an act of Congress to be inoperative

<sup>14</sup> *Holmes v. Walton*. For a history of this somewhat celebrated case, see *The American Historical Review*, vol. IV, pp. 456, etc.

<sup>15</sup> *Trevett v. Weeden*. For the history of this case, see Arnold, "History of Rhode Island," vol. II, ch. 24; also Coxe, "Judicial Power and Unconstitutional Legislation," pp. 234 ff., and Kent, "Commentaries," 12th ed., pp. 450-453. These and other early decisions by the state courts are discussed by Moore in his "The Supreme Court and Unconstitutional Legislation" (1913), ch. 1, and by Haine, in his "The Conflict over Judicial Powers in the United States to 1870" (1909), pp. 21 ff.

<sup>16</sup> "Law of the Constitution," 2d ed., p. 125. Compare also Cooley ("Constitutional Limitations," 7th ed., p. 228), who observes that "it is now generally agreed that the courts cannot properly decline to overrule the acts of the legislature when it has exceeded the authority set by the constitution to its limits."

<sup>17</sup> Mr. Justice Patterson, in the case of *Vanhorne's Lessee v. Dorrance*, 2 Dallas Reports 304.

<sup>18</sup> 1 Cranch 137.

on account of its repugnance to a provision of the federal constitution. Since then the Supreme Court has set aside fifty-three acts of Congress wholly or in part, and over three hundred state statutes.<sup>19</sup> How many acts of the state legislatures have been pronounced unconstitutional by the courts of the states is not known, but the number probably reaches into the thousands.

**Hamilton's Defense of the Doctrine.**—Although, as has been said, the federal constitution contains no provision which could be construed as conferring upon the courts such power over the acts of the legislature, it was understood by the statesmen of 1787-1789 as being an inherent part of the judicial power and needed no express authority for its exercise.<sup>20</sup> Hamilton, in 1788, in advocating the ratification of the constitution, asserted that the courts undoubtedly possessed the power to pronounce legislative acts void when contrary to the constitution, and he supported the right by a line of argument which has never been surpassed by its clear, convincing, and logical statement. Addressing himself to the contention which had been advanced that the exercise of such a power involved the superiority of the judiciary over the legislative power, he declared : "There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor or commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. To deny this, would be to affirm that the deputy is greater than the principal ; that the servant is above his master ; that the representatives of the people are superior to the people themselves ; that mere men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."<sup>21</sup> He pointed out that it could not have been presumed that

<sup>19</sup> The acts of Congress which have been held unconstitutional are listed in Warren, "Congress, the Constitution and the Supreme Court" (1925), ch. 9. A list of federal and state statutes and municipal ordinances (total 279), held unconstitutional by the United States Supreme Court down to 1911, may be found in Moore, "The Supreme Court and Unconstitutional Legislation" (1913), "Studies in Hist., Econ., and Public Law," Columbia University, vol. LIV, App. III, pp. 139-141. See also Martin and George "American Government and Citizenship" (1927), p. 175, which gives statistics somewhat different from those quoted above.

<sup>20</sup> See the elaborate review of the early opinions to the effect that the Supreme Court possessed this power, in Warren, *op. cit.*, chs. 2-4.

<sup>21</sup> *The Federalist*, No. 78 (Dawson's ed.).

the constitution which specified the powers conferred upon the legislature intended in the same breath to make the legislature the judge of its own powers and to establish the principle that the construction placed by it upon the extent of those powers was to be conclusive upon the other departments. "A constitution is in fact and must be regarded," Hamilton went on to say, "as a fundamental law." It therefore belongs to the judiciary to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be a variance between the two, that which has the superior obligation and validity ought, of course, to be preferred ; or, in other words, the constitution ought to be preferred to the statute ; the intention of the people to the intention of their agents. "Nor does this doctrine by any means," he said, "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both ; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."<sup>22</sup>

**The Case of *Marbury v. Madison***—Chief Justice Marshall, in the case of *Marbury v. Madison*, referred to above, analyzed the question in all its bearings and with the logic and insight of which he was a master. Following up Hamilton's argument, he showed that the limitations of a written constitution could have no meaning if those upon whom they were imposed were left free to judge of their nature and extent. There must be some supreme authority other than that which is limited, capable of judging in such cases and with power to compel respect for the limitations. Speaking of the government of the United States, he said : "The powers of the legislature are defined and limited ; and that these limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained ? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the

<sup>22</sup> "The Federalist" (Dawson's ed.), p. 542.

persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature illimitable." The great chief justice concluded that "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution,—if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law,—the courts must determine which of these conflicting rules govern the case. This is the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act must govern the case to which they both apply."<sup>23</sup>

<sup>23</sup> "The power of interpreting the laws," observed Judge Story, "involves necessarily the function to ascertain whether they are conformable to the constitution or not; and if not so conformable, to declare them void and inoperative. So the constitution is the supreme law of the land; in a conflict between that and the laws, either of Congress or of the state, it becomes the duty of the judiciary to follow that only which is of paramount obligation. This results from the very theory of a republican constitution of government; for otherwise the acts of the legislature and executive would in effect become supreme and uncontrollable, notwithstanding any prohibition or limitations contained in the constitution; and usurpation of the most unequivocal and dangerous character might be assumed without any remedy within the reach of the citizens." See also Kent ("Commentaries," vol. I, p. 449), who declared that "it belongs to the judicial power as a matter of right and duty to declare every act of the legislature made in violation of the constitution, or of any provision of it, null and void." See also Dicey ("Law of the Constitution," p. 175), who in discussing the excellence of this principle declares that it "makes the judges the guardians of the constitution and provides the only safeguard which has hitherto been invented against unconstitutional legislation." For a scholarly essay by the late James B. Thayer on the origin and history of the American doctrine of the right of the courts to declare acts of the legislature unconstitutional, see the *Harvard Law*

"The courts," said the late Judge Cooley, "sit not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within the constitutional limits that they are at liberty to disregard its action; and in doing so they only do what every private citizen may do in respect to the mandates when the judges assume to act and to render judgment or decrees without jurisdiction. In exercising this high authority the judges claim no judicial supremacy, they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."<sup>24</sup>

**European Practice ; Germany.**—This function of the judiciary, first exercised by the courts in the United States, was for a long time unknown in practice in Europe. There the principle was universal that the legislature itself was the sole judge of its powers, and the right of the courts to declare its acts unconstitutional and to treat them as null and void was not admitted and it was not exercised in practice. In the old German Empire (1871-1919) it was admitted, however, that the courts had the power to decide whether acts of the legislature whose validity was contested were *formally* valid; that is, whether they had been passed in accordance with the requirements of the constitution and promulgated by the head of the state, but their right to judge of the *material* validity of legislative acts, that is, whether their enactment was within the constitutional power of the legislature.

*Review*, vol. VII : also printed in Thayer's "Legal Essays" (1908). See also Rawle, "On the Constitution," ch. 21 ; Wilson, "Law Lectures," vol. I, p. 460 ; Bowman, "Congress and the Supreme Court," *Pol. Sci. Quar.*, 1910, pp. 20 ff. ; Beard, "The Supreme Court and the Constitution" (1913) ; Boudin, "Government by Judiciary," *Pol. Sci. Quar.*, 1911, pp. 258 ff. ; McLaughlin, "The Court, the Constitution, and Parties" (1913) ; Goodnow, "The Legislative Power of Congress under the Judicial Article of the Constitution," *Pol. Sci. Quar.*, 1910, pp. 557 ff. ; Powell, "The Supreme Court's Review of Legislation," *Pol. Sci. Quar.*, 1922, pp. 486 ff. ; Corwin, "The Doctrine of Judicial Review and the Constitution" (1914) : Moore, work cited above ; Haines, work cited above ; Willoughby, "Constitutional Law of the United States" (1910), vol. II, chs. 50-55 ; Warren, work cited above, chs. 1-3, and the valuable study of Lambert, "Le gouvernement des juges" (1921).

<sup>24</sup> "Constitutional Limitations" (7th ed.), p. 228.

was not recognized. Nor was it generally claimed or exercised in fact by the courts. There was one exception to this principle. It was admitted that the Imperial Court (the *Reichsgericht*) had the power to determine whether a law passed by a state legislature was contrary in a material sense to the imperial constitution or an imperial law, and this power was exercised by the Imperial Court on a number of occasions. The German Empire being federally organized, the exercise of such a power by the Imperial Court or some other imperial authority was necessary to insure the supremacy of the imperial constitution and laws and to keep the states within the sphere marked out for them. But the power of the Imperial Court to judge of the constitutionality of imperial law was not admitted, nor was it ever exercised by the Court.<sup>25</sup> With regard to ordinances (*Verordnungen*), the authorities were practically unanimous that the courts had the power to pass on their validity except where, as in Prussia, the constitution expressly forbade it. The new German constitution (Art. 13) affirms the supremacy of the national laws over state laws and declares that in case of differences of opinion as to whether a state law is compatible with a law of the *Reich*, the competent national or state authority may request a decision from a superior judicial court of the *Reich* in accordance with the requirements of a special national law. A national law of April 8, 1920, designates the Supreme Court at Leipzig as the tribunal competent to decide such questions. As stated above, the courts exercised this power under the old constitution, but the decision in such cases was conclusive only between the parties. Under the new constitution, the question may be raised as an independent issue at the instance of either the national government or a state government, and when a decision has been rendered by the Supreme Court that a particular state law is incompatible with a national law, the effect is general, and the law is null and void for the future.<sup>26</sup> No power is expressly conferred on the Supreme Court

<sup>25</sup> In a decision of March 28, 1889, the Imperial Court stated that the weight of authority was in favor of the right of the court in such cases, but the court never assumed to exercise it. *Entscheidungen in Civil Sachen*, vol. XXIV, p. 3.

I have discussed at length the question of the right of the German courts under the old constitution to judge of the constitutionality of legislative acts, the practice and the views of German jurists, in an article entitled "The German Judiciary," *Pol. Sci. Quar.*, vol. XVIII (1903), pp. 524 ff.

<sup>26</sup> Compare Oppenheimer, "The Constitution of the German Republic,"

to declare a national law unconstitutional, but the civil division of the Supreme Court (*Reichsgericht*) on November 4, 1925, held that notwithstanding the silence of the constitution the court was competent to pass on the question of the unconstitutionality of national laws.<sup>27</sup> The new constitution of Prussia (Art. 87) provides that constitutional conflicts shall be decided by the Prussian state supreme court, but this was probably not intended to confer on the court power to declare null and void acts of the legislature which are contrary to the constitution.

**Austria.**—The 1920 constitution of the Austrian republic (Art. 140) conferred on the Supreme Constitutional Court jurisdiction, upon application of the federal ministry, to decide upon the unconstitutionality of federal laws.<sup>28</sup> Application by the ministry was not, however, necessary in case the question of unconstitutionality was raised in an actual case before the court. In that event the court could decide the question on its own responsibility without a ministerial request. This principle differs from that followed in the United States in that a decision upon the question of unconstitutionality could be obtained somewhat as an advisory judicial opinion may be, that is, upon the request of the government and not exclusively by the plaintiff in a suit.<sup>29</sup> But this interesting system of judicial review was abolished by the Austrian constitution of 1934.

p. 163. Although by the terms of Article 13 of the constitution the issue of unconstitutionality can be raised only by the competent national or state authorities, the criminal division of the Supreme Court has in fact entertained jurisdiction in a case where the issue was raised by a private individual and in that case it refused to enforce a state statute which it held to be contrary to a national law. The case is cited by Blachly and Oatman in the *Amer. Pol. Sci. Rev.*, I.C., 1927, p. 115.

<sup>27</sup> Blachly and Oatman, *loc. cit.*, p. 116.

<sup>28</sup> It should be remarked that this power was reserved exclusively to the Constitutional Court (the *Verfassungsgerichtshof*). By Article 89 of the constitution other courts were expressly prohibited from inquiring into the validity of laws which had been duly promulgated. Nor could they "seize" the Constitutional Court for the purpose of obtaining a decision upon the question. See Kelson, *Die Verfassungsgesetze der Republik Oesterreich*, pp. 191 and 258, and Adamovitch, *Die Prüfung der Gesetzen und Verordnungen durch den österreichischen Verfassungsgerichtshof*, p. 271.

<sup>29</sup> When the Supreme Constitutional Court had pronounced a law to be unconstitutional, the federal chancellor was required to publish immediately the fact of its nullity, and the annulment was effective from the day of publication.

**Other European Countries.**—The constitution of Czechoslovakia (Introductory Law, Art. 1) lays down the principle that legislative enactments which are in conflict with the constitution are invalid. As in Austria, jurisdiction to decide upon their unconstitutionality is conferred upon a special "constitutional" tribunal, the judges of the ordinary courts being limited merely to the determination of the question whether the law has been properly promulgated by the president of the republic (Art. 102). In the cases of ordinances, however, they may go further and pronounce upon their material validity. Within the first six years under the constitution, the "constitutional court" had occasion to pronounce several acts of the legislature void because of their inconsistency with the constitution.<sup>30</sup> The new constitutions of Finland and Yugoslavia appear to contain no pronouncement on the question; that of Poland expressly declares that the courts shall have no power to inquire into the validity of duly promulgated statutes (Art. 81).

In Switzerland, where the federal system of government is found, the federal supreme court has, as in Germany, power to declare invalid acts of the cantonal legislatures which are in conflict with the federal constitution,<sup>31</sup> but it cannot inquire into the constitutionality of laws passed by the federal legislature.<sup>32</sup>

The constitution of Rumania (1923) expressly confers upon the court of appeal the right to judge the constitutionality of laws and to refuse to apply those which are unconstitutional. Such a decision, however, is limited to the case decided (Art. 103). The court cannot, therefore, render a decision upon request of the government, in a hypothetical case.<sup>33</sup>

unless the court fixed a time (not exceeding six months later) when it should become effective.

<sup>30</sup> Thus, on November 7, 1922, it held that an ordinary law which authorized the government to act by means of an ordinance in a case in which action by legislation was necessary, was contrary to Arts. 6 and 55 of the constitution. Carré de Malberg, in the *Bul. de la soc. de lég. comp.*, 1926, p. 33.

<sup>31</sup> See Art. 113 of the constitution.

<sup>32</sup> Brooks "Government and Politics of Switzerland," p. 166, and Dubs, *Das öffentl. Recht der schweiz. Eidgenossenschaft*, 2d ed., pp. 90 ff. For the reasons why the Swiss have not adopted the American doctrine, see Cunningham, "The Swiss Confederation," p. 295. But the constitutions of the cantons of Uri Schwyz, and Unterwalden confer on the courts jurisdiction to set aside laws which are contrary to their own prescriptions.

<sup>33</sup> Under the former constitution of Rumania the courts without express consti-

In Norway it is established by judicial precedent that the courts may pass upon the question of the unconstitutionality of the laws.<sup>34</sup> The same right is recognized by numerous decisions of the supreme court of Greece.<sup>35</sup>

**British Practice.**—It will be seen from this summary that the American doctrine of unconstitutionality has made considerable headway in Europe, especially in recent years, and the increasing favor with which it is regarded by Continental jurists indicates that it is likely to be still further extended in the future. In the majority of Continental states, however, the rule still prevails that the legislature is the sole judge of its powers and that whatever it enacts in the form of law the courts are bound to apply, even though it may be clearly in conflict with the express prescriptions of the constitution. In Great Britain the very keystone of the constitution is the supremacy of parliament, and if that body should enact a law infringing upon the most sacred constitutional rights of the people, public opinion might pronounce it "unconstitutional," but no court would dare claim or exercise the right to do so and it would be applied as if it were expressly authorized by the constitution.<sup>36</sup> The application of the doctrine of unconstitutionality in Great Britain is found only in the right of the Judicial Committee of the Privy Council (the court of appeals in cases appealed from the courts of the British colonies and dominions) to declare unconstitutional an act of a colonial or dominion legislature. The British courts, however, exercise freely the right to declare null and void orders in Council or other executive acts which

tutional authority asserted and exercised the right to pronounce upon the question of unconstitutionality and to refuse to apply acts of the legislature which were found to be in violation of the constitution. See notably a decision of the Court of Cassation of March 16, 1912, discussed in the *Rev. du droit pub.*, 1913, pp. 153, 365.

<sup>34</sup> See the decisions cited by Jèze in the *Revue du droit public.*, 1912, p. 145.

<sup>35</sup> Duguit, "Traité de droit const.," 2d ed. (1923), vol. III, p. 689.

<sup>36</sup> But Coke in his day made bold to assert that an act of parliament "against common right and reason could be adjudged void at common law" (8 Coke 114), and Hearn adopted his view ("Government of England," pp. 37-40). Modern opinion, however, is to the contrary and no English court has ever asserted the right to declare an act of parliament null and void because of its unconstitutionality. On the whole matter see Dicey, "Law of the Constitution," lect. II, and Lowell, "The Government of England," vol. I, pp. 67.

are deemed to be unconstitutional or contrary to international law (see e.g., the case of the *Zamora*).

**French Theory and Practice.**—In France, likewise, the supremacy of parliament is a fundamental constitutional principle and any law enacted by it and duly promulgated by the president of the republic must be applied by the courts whether it is in accord with the constitution or not.<sup>37</sup> The question came before the French Court of Cassation for the first time in 1833 in a case involving the constitutionality of a press law passed by parliament which was plainly in violation of Article 69 of the constitutional charter of 1830. A powerful appeal was made to the court by an eminent French jurist, to declare the law unconstitutional, and he pointed out that if the parliament could modify or abrogate with impunity an article of the constitution, France in reality had no constitution, and the limitations which it imposed on the parliament were futile. But the court decided that it had no power to pronounce any law unconstitutional.<sup>38</sup> In the following year the court affirmed this decision and it has been followed ever since. It has long been established, however, that the judicial courts may refuse to impose fines for the violation of illegal ordinances and that the Council of State (the supreme administrative court) may annul ordinances (with a few exceptions) issued by the administrative authorities including even those of the president of the republic, which are *ultra vires*, that is, in excess of the legal competence of those issuing them—a power

<sup>37</sup> Compare Esmain, "Droit const." (7th ed.), vol. I, pp. 592 ff.; Larnaudie, in *Bul. de la soc. de lég. comparée*, 1902, p. 220; Laferrière, "Traité de droit admin.," vol. II, p. 5; Tessier, "De la responsabilité de la puissance publique," p. 15; Moreau, "Le règlement administratif," p. 293; and Jèze, *Revue du droit public*, 1924, pp. 399 ff.

<sup>38</sup> The case is reported in Sirey, *Recueil 33*, I, 357 (1833), and is commented upon by Jèze in the *Revue gen. d'admin.*, 1895, p. 141.

Sieyès in his project for a constitution in 1795 advocated the establishment of a *Jurie Constitutionnaire* with power to judge claims arising from violations of the constitution, and the idea found realization in the "Senate-Conservator" of the constitution of 1800 (Art. 21), which was given power to annul acts of the legislature which were in violation of the constitution. The institution was revived by the constitution of 1852 but disappeared in 1870. At first it showed some independence in the exercise of its power to protect the constitution, but in the hands of the first Napoleon it became a docile instrument for modifying, suspending, and even annulling the constitution. See Duguit *op. cit.*, p. 666 and Trouillard, "Le Sénat-conservateur, ses attributions, son rôle" (1912).

which is freely and often exercised by the Council of State.<sup>39</sup> In view of the fact that a large and increasing amount of French legislation to-day is in the form of ordinances issued by the president of the republic, the actual degree of judicial control in France is very considerable.<sup>40</sup>

As stated above, however, formal acts of parliament are still completely removed from all judicial control.<sup>41</sup> It is true that since there is no "due process of law" clause in the French constitution and no express limitations or prohibitions on the legislative power, acts of parliament in violation of the constitution are almost impossible, and consequently if the courts had the power to declare null and void unconstitutional acts of parliament the occasions for exercising it would be very rare—unless, of course, it be admitted that the Declaration of Rights of 1789 is, as Duguit and others argue, to all intents and purposes a part of the existing constitutional law of France. Otherwise, the rights which the Declaration affirms are, as Esmein maintains, merely dogmas and not enforceable prohibitions on the power of the parliament. For that reason proposals have been made in the French parliament at different times providing for the formal incorporation in the constitution of 1875 of the principles of the Declaration, and, in order that they may be made binding upon parliament, a constitutional provision that the Court of Cassation or a specially created constitutional court be given power to annul acts of parliament which are in violation of those principles.<sup>42</sup>

The French generally have refused to admit the right of the courts

<sup>39</sup> I have discussed at length the subject of judicial control of illegal ordinances by the French courts and the Council of State in an article in the *Amer. Pol. Sci. Review*, vol. IX (1915), pp. 637-657, where the jurisprudence is reviewed and the authorities cited.

<sup>40</sup> As to this see *supra*, p. 715.

<sup>41</sup> It is generally admitted by French jurists that while the courts have no power to declare acts of parliament null and void because of the *material* inconsistency with the constitution they may refuse to apply them because of their *formal* invalidity, that is, because of their not having been enacted and promulgated in accordance with the procedural requirements of the constitution. See Jéze, "Principes généraux du droit admin," p. 212, and Duguit, *op. cit.* (1st ed.), vol. I, p. 159.

<sup>42</sup> Such proposal have been made by the veteran deputy Benoist and by Jules Roche. See Benoist's article in the *Revue des deux mondes*, July 15, 1902 and his "Réforme parlementaire" (ch. entitled *La cour supreme*). M. Leyret, in his "Le gouvernement et le parlement" (p. 31), advocates such a proposal.

to declare acts of parliament unconstitutional, first, because they consider that it would be a violation of the sacrosanct theory of the separation of legislative and judicial powers proclaimed in 1789 and 1790; second, because it would lead to the supremacy of the judiciary over the legislature—the one organ which represents the people and which is elected to express their sovereign will; and third, because it would in all likelihood provoke conflicts between the legislative and judicial authorities and put into the hands of the courts the power to obstruct reforms through legislation—a power which was exercised by the *parlements* (judicial bodies) before the Revolution and the memory of which caused the Revolutionists to pass a law in 1790 (still in force) which forbids the courts to interfere with or suspend the execution of legislative acts.

Nevertheless, there have been able advocates of the American doctrine of judicial review and control, from the time of the establishment of the Third Republic,<sup>43</sup> and in recent years the number of eminent French jurists who approve it has greatly increased.<sup>44</sup> Some of the most distinguished of them, notably Duguit, Jèze, and Barthélémy, maintain not only that the introduction of the practice in France is desirable, but that in fact the courts already have the power and that all they lack is the courage to exercise it. Jèze and Barthélémy, in a learned opinion which they gave to a street railways company of Bucharest in 1912, maintained that when a state adopts a system which distinguishes between constitutional and ordinary laws, between legislative, executive, and judicial powers, and organizes a system of independent judicial tribunals, it thereby impliedly confers upon the latter, as a natural and logical consequence, without the necessity of saying so explicitly, the power and the duty of passing upon the constitutionality of laws contested before it and the power and the duty of refusing to apply laws which are contrary to the constitution.<sup>45</sup> The Supreme

<sup>43</sup> Louis Blanc and Naquet, both members of the national assembly which framed the constitution of 1875, favored it. *Four. off.*, March 12, 1873, p. 1707, and Naquet, "La répub. radicale" (1873), ch. 11.

<sup>44</sup> They include such well-known scholars and publicists as Duguit, Jèze, Hauriou, Benuregard, Coumoul, Benoist, Cahen, Moreau, Saleilles, Thaller, Jalabert, Picot, and Barthélémy. See citation of the sources in my article referred to above, pp. 661-662. See also Duguit *Traité* (2d ed.), vol. III, pp. 670 ff.; and Carré de Malberg, *Bul. de la soc. de lég. comp.* 1926, p. 36.

<sup>45</sup> *Revue du droit public*, 1912, p. 139.

Court of Rumania adopted fully this view of the matter.<sup>46</sup> In France it was ably defended by Mm. Hauriou<sup>47</sup> and Duguit.<sup>48</sup> Duguit in his earlier writings refused to admit the right or the expediency of judicial control, but in his later works he confesses that he was in error and that to-day he "accepts without hesitation" the doctrine as the "necessary and logical consequence of the hierarchy of the laws." He agrees with Hauriou that a judge who decides on a conflict arising in a particular case between a fundamental law and an ordinary law does not meddle (*s'immiscer*) in any manner with the exercise of the legislative power ; he neither arrests nor suspends the execution of a law, and if the inferior law is not applied, that does not result at all from the decisions of the judge but from the authority of the superior law which is imposed upon him as upon the ordinary legislator. To compel the courts to apply a law, which in fact is no law because those who made it exceeded their power, is, he says, to compel them to violate the constitution, the effect of which is to reduce them to a situation of dependence upon the legislature, which is itself a violation of the principle of the separation of powers. Regarding the power of the French judge in this connection he says there is no positive prescription in the constitution which denies him this power ; on the contrary, the texts which consecrate the principle of the separation of powers give it to him by implication.<sup>49</sup>

Duguit expresses the hope that the American doctrine of judicial control will soon be introduced into France, and he predicts that in the near future the right of the Court of Cassation, or the Council of State, or perhaps both, to exercise the same function as that of the United States Supreme Court in respect to unconstitutional legislation will be recognized and exercised.<sup>50</sup>

<sup>46</sup> *Ibid.*, 1913, pp. 153 and 365.

<sup>47</sup> "Droit const.", pp. 137, 267, 296, 302, 317 ff.

<sup>48</sup> *Op. cit.*, vol. III, pp. 671 ff.

<sup>49</sup> *Op. cit.*, vol. III, p. 673 : see also his "Transformations du droit public," p. 97. Judge Coumoul of Toulouse argues in the same sense. See his "Traité du pouvoir judiciaire," ch. 6.

<sup>50</sup> "Souveraineté et liberté" (1922), p. 200. Speaking of the rôle of the United States Supreme Court in this connection, he says of it : *belle et grande institution, très protectrice de la liberté individuelle et de l'indépendance des citoyens et que je regrette que nous n'ayons pas encore en France, mais vers laquelle je crois que nous marchons.*

**Judicial Control of Unconstitutional Legislation in the British Dominions and Latin America.**—Outside Europe the doctrine of judicial review and veto has found more favor. In the Dominion of Canada it is well settled that acts of the dominion and the provincial parliaments which are in conflict with the British North America Act, and provincial acts which are contrary to acts of the dominion parliament, may be declared null and void because of their unconstitutionality (the Canadians prefer to employ the term *ultra vires*), and, as stated above, the Judicial Committee of the Privy Council at London will upon appeal declare those which are unconstitutional to be of no effect.<sup>51</sup>

The Australian Commonwealth Act (Art. 109) expressly declares that "when a law of a state is inconsistent with a law of the commonwealth, the latter shall prevail and the former shall to the extent of its inconsistency be invalid. This article does not directly confer upon the courts the power to decide the question of invalidity, but they have, as in the United States, assumed it on the principle that it is an incident of the judicial power and as such belongs of right to all courts. Both the courts of the commonwealth and those of the states have from the first exercised the power, but owing to the absence of a "due process of law" clause in the Commonwealth Act and the existence of comparatively few constitutional prohibitions upon the power of the states, the number of cases in which the constitutionality of state laws has been contested is relatively small.<sup>52</sup>

In Australia not only have state laws been held unconstitutional but in some cases acts of the commonwealth legislature have likewise been pronounced invalid by the High Court.<sup>53</sup> The practice in the

<sup>51</sup> See Haines, "Judicial Review of Legislation in Canada," *Harr. Law Rev.*, vol. XXVIII (1914-1915), p. 565, where the practice is reviewed and important cases cited; Lefroy, "Law of Legislative Power in Canada"; also, Keith, *op. cit.*, vol. II, p. 1020, and Munro, "The Constitution of Canada," pp. 5 and 219.

<sup>52</sup> On the doctrine and practice in Australia see Haines, "Judicial Interpretation of the Constitution Act of the Commonwealth of Australia," *Harr. Law Review*, vol. XXX (1916-1917), pp. 595 ff. The American doctrine of judicial review was adopted at the outset by the High Court of the commonwealth in the case of *D'Emden v. Pedder* (1 C. L.R. 91 [1904])—a case similar to the American case of *McCulloch v. Maryland*, which the Australian court quoted with approval. The Supreme Court of Victoria in *Walloston's case* (1902) adopted the same view.

<sup>53</sup> See the cases cited by Warren in "Congress, the Constitution, and the

Union of South Africa is the same.<sup>54</sup> The new Irish Free State constitution expressly confers upon the courts power to declare null legislative acts which are in *contravention* of the constitution or the Anglo-Irish treaty, under reserve of the right of appeal to the British Privy Council.

In Latin America the doctrine of judicial control in one degree or other exists in Argentina, Brazil, Bolivia, Colombia, Costa Rica, Cuba, Haiti, Honduras, Mexico, and Venezuela. In several of them, notably Brazil, the United States doctrine has been fully adopted and both national and state laws which are in conflict with the constitution are freely annulled by the highest courts, although, as compared with the practice in the United States, the cases in which laws are pronounced unconstitutional are relatively rare.<sup>55</sup>

The constitution of China proclaimed October 10, 1923 (Art. 108), expressly affirms that laws in conflict with the constitution are null and void.

#### ✓**Justification and Merits of Judicial Control in Federal States.**

—In considering the desirability of the principle of judicial control of legislation it is important to distinguish between its exercise in respect to state or local legislation in countries having the federal system of government and its exercise in respect to national legislation irrespective of whether the system of government is federal or unitary. As pointed out in a preceding chapter, the distinguishing characteristic of a federal union is the division of competence between the union and the several states or provinces which compose it. This division is made by the federal constitution or organic act of union, and either the powers of the central government are enumerated in the constitution or organic act, the residuum of power being left to the member states or provinces or (as in Canada) the powers of the component states or

Supreme Court," p. 163, and Moore, "The Constitution of the Commonwealth" (2d ed.).

<sup>54</sup> *Municipality of Worcester v. Colonial Government* (1907), 24 S.C. Cape of Good Hope 67. On the whole subject see Smith, "Judicial Control of Legislation in the British Empire," *Yale Law Journal*, vol. XXXIV (1925). Before the establishment of the South African Union the courts of the Transvaal asserted the right to disregard unconstitutional legislation, but it provoked a conflict with President Kruger, who denounced the doctrine as an invention of the Devil. Lowell, *op. cit.*, I, 7, and Gordon, *Law Quart. Rev.*, vol. XIV, 343.

<sup>55</sup> As to the doctrine and practice in Brazil, see James, "The Constitutional System of Brazil," pp. 106 ff.

provinces are enumerated, the residuum being left to the central government. In either case, the constitution marks out a sphere of action and authority for each, upon which the other is forbidden to encroach. To maintain this equilibrium and insure the supremacy of each in the sphere allotted to it, some supreme umpire, arbiter, or judge is necessary to enforce respect for the constitutional division of competence and to decide issues arising out of conflicts of authority, otherwise perpetual encroachments and controversies would result and the very existence of the federal system would be endangered. In all existing federal systems, the judiciary now serves as such an umpire or judge and there is a general agreement that there is no other organ of government so well adapted to play this delicate, impartial, and indispensable rôle. Had not the Supreme Court of the United States assumed and exercised this rôle, it would be difficult to imagine what would have been the history of the American union.

**Merits of Judicial Control in Unitary States.**—The necessity of judicial control of legislation in unitary states, however, is far less, for the reason that there is no equilibrium, no division of competence to be maintained. Likewise in states, such as France, having constitutions which do not impose formal limitations or prohibitions upon the legislative power, or which lack what in the United States are known as bills of rights and "due process of law" clauses, the importance of judicial control is not very great and, as stated above, if the courts had the power to pronounce the nullity of unconstitutional acts of the legislature, there would be few occasions for the exercise of the power, since few or no acts of the legislature could be unconstitutional. In states, however, having written constitutions which are largely instruments of grants and prohibitions of power, and where in consequence of elaborate bills of rights, a large domain of individual liberty has been created which is intended to be sacred from governmental intrusion and encroachment, the principle of judicial review and control assumes great importance. Unless the judiciary, or some other equally suitable organ or authority, possesses the power to enforce the constitutional limitations and prohibitions against the legislature they would become mere "scraps of paper," mere admonitions to the legislature without binding effect. As Cremieux, an eminent French jurist, said in 1833 in his argument before the Court of Cassation, if the court has no power to refuse to apply an act of parliament which is clearly

in violation of the constitution so that the parliament might freely violate it with impunity, it follows that the constitution is merely a "rope of sand" and has no real existence. Duguit, one of the most distinguished of living French jurists, himself a recent convert to the doctrine of judicial control, very properly asserts that in a country where the courts do not have the power to refuse to give effect to laws which are clearly contrary to the constitution the people do not really live under a régime of law.<sup>56</sup> Whether this be true or not, it is incontestible that in the absence of such a power the distinction between constitutional and statutory law breaks down, the supremacy of the constitution has no meaning, the legislature is the judge of its own powers, and the enjoyment by the individual of the rights which the constitution confers upon him is uncertain and precarious.

✓ **Criticism of Judicial Control.**—Nevertheless, the principle of judicial control has always had and still has vigorous opponents even in the United States, where it originated and where it has found most favor. Its opponents attack it both upon principle and upon the basis of the results to which it has led in practice. They criticize it because it is a violation of the cherished doctrine of the separation of legislative and judicial powers and because it virtually leads to the supremacy of the judicial over the legislative organs. By allowing the courts to "veto," "nullify," or "invalidate" laws solemnly enacted by the chosen representatives of the people, it in effect makes them the final legislators and controllers of public policy. In the United States it makes the governmental system, in the language of Professor Burgess, an "aristocracy of the robe."<sup>57</sup> Since generally the judges are not chosen by the people, not responsible to them, and in no way subject to their control, the system is, in the language of one of its critics, really a "judicial oligarchy."<sup>58</sup>

The effect, moreover, it is argued, is to impose legislative and political duties upon the courts, in violation of the sound principle that the only natural and legitimate function of a judge is to decide legal controversies. In the United States the practice of the courts has in recent years been criticized not only by radicals, who are opposed to the very principle of judicial control, but also by eminent conservative

<sup>56</sup> "Traité de droit, const." (1923), vol. III, p. 674.

<sup>57</sup> "Political Science and Constitutional Law," "vol. II, p. 365.

<sup>58</sup> Roe, "Our Judicial Oligarchy" (1912).

jurists, who, while in sympathy with the general principle, have reproached the courts for their "hostile or suspicious attitude" toward economic and social legislation, which is imperatively required by the conditions of modern life.<sup>59</sup> In declaring unconstitutional in many cases legislation of this kind, the courts, they charge, have insisted upon applying eighteenth-century theories of economics and social policy to new and changed conditions and have shown a greater regard for the rights of property than for human rights. They emphasize the unfitness of the courts, due especially to their lack of information relative to the facts of modern economic and social life, for passing judgment upon the value or necessity of such legislation.<sup>60</sup> In a number of instances where state statutes have been declared void because of their inconsistency with state constitutions, so strong was the popular demand for the legislation thus nullified that the constitutions were amended so as to overcome the judicial veto. This was done, for example, in Colorado in 1902 and in New York in 1913.

**Recall of Judicial Decisions.**—The increasing frequency with which the courts in recent years have declared legislation unconstitutional<sup>61</sup> led to a movement some years ago in favor of the "recall" of judicial decisions, and in 1912 the movement had the powerful support of Mr. Roosevelt. In brief, the proposal was that where the court had declared a statute unconstitutional, the matter might be submitted to

<sup>59</sup> Compare Freund, "Standards of American Legislation" (1917), p. 32; Dodd, "Social Legislation and the Courts," *Pol. Sci. Quar.*, vol. XXVIII (1913), pp. 1 ff.; also his "The Growth of Judicial Power," vol. XXIV, *ibid.*, pp. 193 ff. See also Seager, "The Attitude of the American Courts toward Restrictive Labor Laws," *Pol. Sci. Quar.*, vol. XIX, pp. 589 ff.; Holmes, "The Path of the Law," *Harv. Law Review*, pp. 457 ff., vol. X; Frankfurter, "Constitutional Opinions of Justice Holmes," *ibid.*, pp. 683 ff.; and Groat, "Attitude of American Courts in Labor Cases." See also the review of opinion in Merriam, "American Political Ideas," pp. 171 ff.

<sup>60</sup> Compare Pound, "Common Law and Legislation," *Harv. Law Review*, vol. XXI, p. 403, where a moderate but able criticism of the present attitude of the courts toward legislation will be found. Professor Pound remarks that "courts are less and less competent to formulate rules for new relations which require legislation. They have the experience of the past, but they do not have the facts of the present..... It is a sound instinct in the community that objects to the settlement of questions of the highest social import in private litigations between John Doe and Richard Roe."

<sup>61</sup> In the State of Illinois statutes were declared unconstitutional in 257 cases between 1870 and 1915. Dodd, "Political Safeguards and Guaranties," *Columbia Law Review*, April, 1915, p. 16.

a popular referendum, and if the verdict of the majority of the electorate was in favor of the law, it should be maintained as in force for the future, notwithstanding the opinion of the court that it was unconstitutional. A provision to this effect was introduced into the constitution of Colorado in 1912, but the example has not been followed in any other states.<sup>62</sup> The proposal has been generally and severely condemned by American jurists as subversive of the independence of the judiciary and as one which would involve a blow at the very foundation of the American system of government.<sup>63</sup> The American Bar Association in 1911 adopted a resolution condemning both the recall of judges and the recall of judicial decisions, and appointed a committee to conduct a campaign against them.

**Divided Decisions.**—One reason for the opposition in the United States to the exercise by the courts of the power of judicial control over legislation is found in the frequency with which statutes have been declared unconstitutional by decisions rendered by a bare majority of the members of the court; in the case of the United States Supreme Court, by a majority of five to four. Such decisions, it is complained, are evidence of the existence of grave doubt on the part of the court as to the unconstitutionality of the statute, yet in spite of it the statute is nullified. To meet this objection it has been provided by constitutional amendment in Ohio and North Dakota that statutes may be declared unconstitutional only by an extraordinary majority of the court, and a similar proposal was made by Senator Borah in 1923 to the effect that the concurrence of seven of the nine justices of the United States Supreme Court should be required to pronounce an act of Congress unconstitutional.<sup>64</sup> But it has been pointed out that such a proposal, if adopted, would in reality lead to decisions by a minority of the court.<sup>65</sup>

<sup>62</sup> As to the movement for the recall of decisions, and especially the views of Mr. Roosevelt, see Merriam, *op. cit.*, ch. 6.

<sup>63</sup> See especially Taft, "Popular Government," pp. 174 ff.; Wickersham, "The Changing Order," chs. 12-13; and the opinions cited in Merriam, *op. cit.*, pp. 194-195.

<sup>64</sup> See his article republished in *Sen. Doc.*, 67th Cong., 4th Sess. (Feb. 19, 1923), p. 3589.

<sup>65</sup> See the trenchant criticism by Mr. Charles Warren in his "Congress, the Constitution, and the Supreme Court," ch. 6. Mr. Warren thus states the import of such a proposal: "that if less than seven judges concur in pronouncing an act invalid, the court shall hold it to be valid; or, in other words, if three judges

**Conclusion.**—It is impossible here to consider the various criticisms of the principle of judicial control of legislation that have been made and the changes of practice or procedure which have been proposed. It must suffice to say that the criticisms have not been generally approved by public opinion in the United States, nor have the proposed changes commended themselves to any considerable number of American jurists. It seems likely, therefore, that both the principle and the existing practice will be maintained generally in the future, and the fact that it has been so widely introduced in other countries in recent years would seem to indicate that it is destined ultimately to become a feature of the jurisprudence of the world.

**The Lawmaking Function of the Courts.**—A final function of the courts, at least in some countries, is the power to create and develop law. The law which they make is known as "case law" or "judge-made law"; in Latin countries, *jurisprudence*. This power results from the universal right of the judges to construe and interpret statutes, and in Anglo-Saxon countries to decide what is the common law when there is no statute covering the question at issue. On account of the deficiencies and ambiguities of language and the carelessness and incompetency of parliamentary draftsmen, the meaning of statutes is frequently not clear,<sup>66</sup> and when the judges are called on to apply them, they must perforce decide what the legislature intended them to mean. More important still, it often happens that the statute has no meaning at all, since the question raised in connection with it is one which never occurred to the legislature and that body could not, therefore, have intended to deal with it or express any opinion on it. In such a case, it belongs to the judges to determine not what the legislature meant but "to guess what it would have intended on a point not present, if the point had been present;" that is, they must legislate to fill up the *casus omissus*.<sup>67</sup> This is not only a right of the

out of nine believe an act to be constitutional, the case shall be decided according to the view held by the minority of the court, and not according to the view held by the majority" (p. 179). Compare also Martin and George, *op. cit.*, p. 174.

<sup>66</sup> Compare Baldwin, "The American Judiciary," p. 81; Cooley, "Constitutional Limitations" (7th ed.), p. 70; and Lieber, "Legal and Political Hermeneutics," p. 13.

<sup>67</sup> Gray, "The Nature and Sources of the Law" (1909), p. 165. "Modern courts may and habitually do," said the German jurist, Windschit, "think over again the thought which the legislator was trying to express," while the Roman

judge, but a duty. Thus in France the civil code declares that a judge who refuses to decide a case on the pretext that the law is silent or obscure or insufficient may be prosecuted on the charge of denying justice to the litigant. In these circumstances the judge must necessarily make the law. In this way the Roman judges built up an immense body of law from the meager fabric of the Twelve Tables, and in like manner the body of the English common law owes its existence in large measure to the judges. Professor Dicey remarks that a large part, and many would add the best part, of the law of England is judge-made law. It includes the greater part of the law of contract, almost the whole of the law of torts, all the rules or doctrines of equity, and the body of law known as the "conflict of laws," or, as it is sometimes called, the body of private international law. This vast body of law was never enacted by parliament and is not recorded in the statute books; it is the work of the judges and is to be found in the reports of the courts. It may also be added that many important acts of parliament are little more than statutory declarations of the law which had already been built up by the courts.<sup>68</sup> Likewise, in some continental European countries, where judicial precedents play a much less important rôle than in England, the quantity of judge-made law is considerable. Thus in France almost the whole body of administrative law (*the droit administratif*) has been built up by the decisions of the Council of State, the supreme administrative court of the country. Nevertheless, there is a school of jurists who maintain that in such cases what the judge really does is not to "make" the law but to "find" it; that is, he merely determines what is the existing custom in regard to the point at issue and officially stamps it with his approval. This was the jurists went even further, and undertook "to think out the thought which the legislator was trying to think, that is, what he would have intended had he known what future conditions would be." Quoted by Professor Munroe Smith in an article entitled "Judge-made Constitutional Law," in *Van Norden's Magazine*, 1907, p. 25. British and American judges, it may be added, frequently do what was here attributed to the Roman judges. Bishop Hoadley, in a sermon preached before the king in 1717, proclaimed a doctrine that has often been quoted and approved by British and American jurists: "Nay," he said, "whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Lawgiver to all intents and purposes and not the person who first wrote and spoke them."

<sup>68</sup> "Law and Public Opinion in England" (1905), pp. 360, 484. Edward Jenks estimates that about two thirds of the fundamental rules of English law to-day is judge-made or case laid. *Harv. Law Review*, vol. XXX, p. 14.

view of the late James C. Carter, an eminent American lawyer, who maintained that the common-law judges in Anglo-Saxon countries were not the creators of the common law, but rather its discoverers.<sup>69</sup> This was the orthodox theory long followed. It assumed that the common law was nothing but customary law and that the function of the judge was merely to find it, not to make it. The reported decisions of the courts were, therefore, merely evidences of the customs and of the law derived therefrom, not the sources of the law itself.<sup>70</sup>

But the preponderance of juristic opinion to-day is that the judges, at least of Great Britain and America, do make law by means of the precedents which they establish through their decisions.<sup>71</sup> The notion of "judge-made" law has, however, from the first found able critics, such as Bentham, and they are not lacking to-day. To them the idea connotes "judicial usurpation" of functions which properly belong only to the legislature. But the better opinion is that judicial legislation is a necessary element in the development of the common law.<sup>72</sup> "Human affairs being what they are," said Lord Bryce, "there must be a loophole for expansion or extension in some part of every scheme of government; and if the constitution is rigid, flexibility must be supplied from the minds of the judges."<sup>73</sup>

**Judicial Precedents.**—The decisions of the courts which make or declare the law are known as precedents. Precedents have doubtless

<sup>69</sup> "The Ideal and the Actual in the Law," *American Law Rev.*, vol. XXIV, pp. 752 ff. Compare in the same sense Hammond's notes to his edition of Blackstone (vol. I, sec. 2), where he denies that the judges "make" common law although he concedes that "historically" they did make law, which, says Gray (*op. cit.*, p. 211), is an admission that they do make law.

<sup>70</sup> The most distinguished continental European representative of the school which maintained this view was Savigny. See his *Heut. röm. Recht*, secs. 7, 12.

<sup>71</sup> Compare Gray, *op. cit.*, especially pp. 164 and 222, and Salmon, "The Theory of Judicial Precedents," *Law Quar. Review*, vol. XVI (1900), pp. 376 ff., who asserts that the common law of England has been "manufactured" by the judges through the precedents established by the decisions. Compare also Thayer, "Judicial Legislation; Its Legitimate Function in the Development of the Common Law," *Harv. Law Review*, vol. V (1891-1892), pp. 172 ff.

<sup>72</sup> Compare Thayer, article cited, p. 189.

<sup>73</sup> "Studies in History and Jurisprudence," vol. I, p. 197. Dicey (*op. cit.*, p. 359, n. 2) remarks that while it is true that an English judge is primarily an "interpreter," not a "maker," of law, nevertheless he does, by interpretation "make" law, and it is immaterial whether we call such law "judge-made" or something else.

exercised great influence in all systems of law, but their influence has been especially great in the Anglo-American system. In Great Britain, the British colonies and dominions, and the United States a precedent has authority ; it is not merely evidence of the law, but it is a source of law, and the courts, in principle, are bound to follow it. In France, Germany, and on the Continent generally, where the law is codified, however, judicial precedents are not binding even upon the inferior courts ;<sup>74</sup> they have no more legal authority than the opinions of text writers and commentators, though in practice great respect is shown them and they are often followed.

Sir Frederick Pollock, an eminent English jurist, compares the system of case law to the method of a natural science. As science grows and develops with each new experiment, so are decisions in each case a step in the growth of law, a new datum for future reasoning.<sup>75</sup> The underlying principle of a decision which constitutes a precedent is called the *ratio decidendi* ; anything said by the judge which is not required to support the decision is *obiter dicta*, and it has not the force of law and is not binding upon the judges in future cases.

Precedents are of two general kinds : first, those which *create* law for the future ; and, second, those which merely *declare* the preëxisting law. The latter are naturally much more numerous than the former, though creative precedents are far more important. Precedents have also been classified as *authoritative* and *persuasive*. An authoritative precedent is one which the judges in future cases must follow whether they approve it or not ; a persuasive precedent is one which is not obligatory but will be taken into consideration and given such weight as in the opinion of the judge it seems to deserve. Examples of authoritative precedents are the decisions of the superior courts, which are binding upon all inferior courts ; examples of persuasive precedents are

<sup>74</sup> Compare Gray, *op. cit.*, p. 198, and Salmond, article cited, p. 376. Compare also Dicey (*op. cit.*, 485), who points out that while on the Continent precedent is of less weight than in England, it nevertheless counts, and in France especially judge-made law—*la jurisprudence*, as it is called—is by no means lacking.

<sup>75</sup> "Essays in Jurisprudence and Ethics," p. 237; also his "First Book of Jurisprudence" (2d ed.), pt. II, ch. 6.

the decisions of foreign courts (especially as among Anglo-Saxon countries).<sup>76</sup>

**The Principle of *Stare Decisis*.**—While, as stated above, judicial precedents of an authoritative character are generally binding on the judges, they are at liberty to depart from them (and superior courts may even overrule them) when in the opinion of the judge they are wrong because contrary to law or reason, although in practice this is rarely done in the United States or the British Empire. In those countries, the doctrine of *stare decisis* is a fundamental principle of jurisprudence, and while it tends to sacrifice the rational development of the law to the maintenance of certainty it is believed that the advantages of the latter outweigh in the long run the disadvantages. When a precedent has been established, rights become vested under it, and contracts are entered into in the expectation that it will be maintained. Justice, therefore, may require that the precedent should be allowed to stand although it was originally founded on error. "It is better," said Lord Eldon, "that the law should be certain than that every judge should speculate upon improvements in it." But on the continent of Europe a different view and practice prevail. There it is believed that the disadvantage of following an outworn precedent or one which is wrong from the first is greater than the temporary or occasional inconvenience or injustice which may result from disregarding it. The development of the law should, therefore, proceed along the lines of rational principles and abstract justice rather than upon the strict rule of *stare decisis*. As to which system possesses the preponderance of advantage, there will probably always be a difference of opinion and practice.<sup>77</sup>

## II. ORGANIZATION OF THE JUDICIARY

**Principles of Organization.**—The judicial organ everywhere differs essentially from both the executive and legislative organs. Subject to the qualifications mentioned in the chapter on the executive organ,<sup>78</sup> the supreme executive power is to-day universally intrusted to

<sup>76</sup> The nature, kinds, and binding force of precedents are lucidly discussed by Salmond in the article cited above.

<sup>77</sup> The merits and defects of judicial legislation are luminously discussed by Dicey, *op. cit.*, pp. 393 ff.

<sup>78</sup> See p. 681 *supra*.

a single magistrate while the legislative power is exercised by a more or less numerous assembly, usually consisting of two chambers. The judicial power, on the other hand, is exercised neither by a single magistrate nor by an assembly, but by a series of magistrates or collegially constituted tribunals usually hierarchically organized one above another, with a supreme court of review or cassation at the apex.<sup>79</sup> In Anglo-Saxon countries the courts, except those of appeal, usually consist of a single judge, while in Germany, France, and the continental European countries generally the system of *pluralité des juges* exists for all the courts except those of the justices of the peace; that is, they are collegially organized. Thus, in France the tribunals of first instance are composed of from three to fifteen judges, the courts of assizes of three judges, and so on, no judgment being valid unless it is rendered by at least three judges. In France and continental Europe generally the idea of justice dispensed by a single judge has never found general favor, and the notion persists that the authority of a judgment bears a certain relation to the number of judges who render it. Plurality of judges, it is believed, affords a safeguard against arbitrariness and enables the court in criminal cases to resist more effectively the influence of the public prosecutor.<sup>80</sup> But this system necessitates a great multiplicity of judges—there are more than five thousand in France and nearly as many in Germany—and consequently a heavy budget for the department of justice, even with inadequately paid judges. For this and other reasons, some ministers of justice in France, especially in recent years, have proposed the abolition of the system of "plurality" and the substitution of a system of single judges for the lower courts.<sup>81</sup>

<sup>79</sup> In Italy, formerly, there were five supreme courts, or courts of cassation, sitting in five different cities and having coördinate jurisdiction, so that no one was superior to the others in their jurisdiction or authority. Since the advent of Mussolini, however, four of them have been abolished, leaving only that at Rome.

Supreme courts are of two kinds: first, tribunals of review, with power to revise the decisions of the lower courts, as in Great Britain and the United States; and, second, courts of cassation, having mainly only jurisdiction to "break" or quash the decisions of the lower courts, in appeal. Such, with slight exceptions, is the French Court of Cassation.

<sup>80</sup> The French antipathy to judgments rendered by a single judge finds expression in the old French proverb: *juge unique, juge inique*.

<sup>81</sup> As to this, and the organization of the French courts generally, see my article "The French Judiciary," *Yale Law Jour.*, vol. XXVI (1917), pp. 349 ff. and the authorities there cited. As to the organization of the German courts see

The large number of judges in Germany, France, and the Continental countries generally forms a striking contrast to the organization of the judicial systems of Great Britain and the United States, where the number of judges is, in comparison, relatively small.<sup>82</sup>

Another difference between the Anglo-American and Continental systems is to be found in the British and American practice by which the judges go "on circuit" from county to county holding court in different towns; that is, for the convenience of litigants, the courts go to them instead of requiring them to seek out the court in a distant community. In continental Europe, on the other hand, the courts are "sedentary" or localized, that is, they generally sit always in a particular town and litigants must take their cases there to have them decided.<sup>83</sup>

Perhaps one advantage in the organization of the judiciary on the continent of Europe as compared with that in most of the American states is to be found in the more unified and integrated character of the judicial system. In late years there has been a movement in the United States looking toward the reorganization of the state judiciaries so that the whole judicial power of the state (at least the civil jurisdiction) shall be vested in one great court, of which all tribunals will be branches, departments, or divisions.<sup>84</sup> Actual steps in this direction have recently been taken in several states (notably in Ohio, Wisconsin, Massachusetts, and Oregon) by the creation of judicial administrative councils to supervise and coördinate the work of the courts, and in 1922

my article "The German Judiciary," *Pol. Sci. Quar.*, vol. XVII (1903), pp. 420 ff., and the authorities there cited.

<sup>82</sup> In England for example, with a population of more than 30,000,000 inhabitants, the total number of judges who actually exercise judicial functions hardly exceeds one hundred. Compare Lowell, "The Government of England," vol. II, ch. 60, and Lawson and Keedy, "Criminal Procedure in England," *Journal of the Amer. Institute of Criminal Law and Criminology*, vol. I, pp. 599, 763 ff.

<sup>83</sup> There were in France, at the time of the Revolution, some who advocated the English system of "circuit" courts (*Juges ambulantes*), and advocates of it are not lacking to-day, but it has never found general favor in France. See my article on "The French Judiciary" cited above, p. 351.

<sup>84</sup> Such a proposal, drafted by Dean Pound of Harvard University, was made by a committee of the American Bar Association in 1909. See Harley, "A Unified Court System," address before the Nebraska State Bar Association; address by Dean Pound before the Minnesota Bar Association; address by Kales before the Chicago Bar Association in 1913, and Smith, "A Modern Unified Court," address before the Mississippi State Bar Association, 1915.

a bill was passed by Congress creating a council of judges to supervise the work of the federal courts.<sup>83</sup> The new constitution of Louisiana (1921) provides for a more highly unified system than is to be found in any other American state.

**Organization of Courts in Federal States.**—In states having the federal system of government there are usually two separate and distinct series of judicial bodies, one to exercise the national or general jurisdiction of the whole union, the other the local jurisdiction in each component state.

This is not necessarily so, however, as the organization of the German judicial system clearly shows. Instead of two separate and distinct systems, one to exercise the judicial power of the federation (*Reich*) and the other that of each individual state (*Land*), there is a single uniform system for the federation and the states, all the courts being organized under national law and exercising their functions in accordance with a uniform code of procedure. Thus the entire judicial system of the country, from the bottom to the top, rests upon the same basis; the competence and procedure of all the courts are determined by national law, and they are held by judges whose qualifications and tenure are prescribed by the same authority. There is no division of jurisdiction between the federation and the states; in short, the federal principle has no place in the judicial organization of that country. Nevertheless, with the exception of the *Reichsgericht*, the courts are all regarded as state tribunals rather than as national courts, the judges being appointed by the state governments and their compensation being determined and provided by the same authorities. Moreover, they exercise their jurisdiction in the name of the local governments and are subject to the oversight of the states in which they are situated. As there is one uniform judicial organization for all the German states, so there are common national codes of civil and criminal law and of procedure. Thus neither diversity in judicial organization nor diversity of law exists in Germany, though the state is federal in its organization.

In the United States, on the contrary, there are as many systems

<sup>83</sup> See the *Journal of the American Judicature Society* for June, 1923, p. 5, and June, 1924, p. 245, and especially Potts, "Unification of the Judiciary," *ibid.*, 1924, pp. 85 ff.

of judicial organization and of law and procedure as there are states. Each individual commonwealth organizes its own judiciary and frames its own codes of law and procedure, according to its own notions and its own conception of its local needs and conditions. Nevertheless, there is in reality far more of resemblance than of diversity, owing to the common basis which is afforded by the common law, upon which the legal system of each of the states (except Louisiana) rests. There are, of course, variations, but in essentials there is remarkable similarity and uniformity. Only in a limited sense are the courts of one state regarded by those of another as foreign. The constitution of the United States requires that the courts of each state shall give full faith and credit to the records and judicial proceedings of the other states; and the spirit of judicial comity—the deference paid by the courts of one state to the decisions of the others—which characterizes interstate judicial relations constitutes a powerful unifying force. This rule of comity, together with the full faith and credit provision, makes possible the enforcement in one state of rights acquired in others and likewise contributes to the prevention by one of acts which would infringe on prohibitions created by others.<sup>86</sup>

**Two General Types of Courts.**—In all countries the judicial tribunals are of two kinds: first, those which may be called the ordinary or regular courts, whose normal function is the decision of legal controversies between individuals and the trial of criminal cases; and second, those which may be classified as extraordinary or special courts. In the latter category may be placed the administrative courts, military, commercial, and industrial courts, labor arbitration courts, courts of claims, conciliation courts, probate courts, customs courts, courts of impeachment, consular courts, and various others. A good many of those in this latter category exercise only what is known as voluntary or non-contentious jurisdiction.

**Administrative Courts.**—It is impossible here to consider the organization and functions of the multifarious special tribunals which are found in the different countries. It must suffice to discuss briefly the most important of them, namely, the administrative courts which are found in France, Germany, and a goodly number of other continental European countries. In these countries the administrative courts

<sup>86</sup> Compare Baldwin, "The American Judiciary," p. 182.

have a separate and distinct organization, they constitute a system parallel with that of the ordinary judicial courts, they are charged with deciding controversies mainly involving claims against the state, and they apply a body of law separate and distinct from that of the civil law. The idea of the separation of the administrative jurisdiction from the ordinary civil jurisdiction originated in France at the time of the Revolution and was a consequence of the general repugnance to the control which the judicial courts had exercised over the administrative authorities during the old régime. The feeling was that if the judges were allowed to decide controversies arising between the state and its administrative authorities, on the one hand, and private individuals, on the other, it would result in judicial interference with the operations of the government and impair the efficiency of the administration. It was accordingly provided by law (Act of August 16, 1790) that the judicial and administrative functions should be kept separate and distinct and that the rôle of the judicial courts should be restricted to the decision of cases arising under the civil and criminal law.<sup>87</sup> At first the decision of administrative controversies was left to the administration itself, but in time a series of special administrative tribunals or councils were created to exercise this function. They are the council of prefecture in each departmental circumscription and the Council of State at Paris, which serves as

<sup>87</sup> In many of the German states, administrative courts modeled largely on the French system have existed since 1875, although in Germany, unlike France, the administrative judges are irremovable by the government. The new German constitution (Art. 107) requires the establishment of administrative courts "for the protection of the individual against ordinances of the executive" both in the *Reich* and in the states where they do not actually exist. In Italy since 1890 a system of administrative jurisdiction and of administrative courts patterned after that of France has existed. By an amendment to the Swiss constitution of October 25, 1914, provision was made for the establishment of a federal administrative court. In Belgium there are no administrative courts, and the remedy of an injured individual is similar to that in England and the United States. See Reyd, "Government and Politics of Belgium," p. 111. The constitution of Finland (Art. 57) provides for the establishment of a supreme administrative court. The constitution of Poland (Art. 86) provides for the creation by statute of a special competence court (tribunal of conflicts) to decide conflicts of jurisdiction between the administrative authorities and the courts. The constitution of Czechoslovakia (Art. 96) declares that the judicial power shall be separated from the administrative power, but it does not specifically require the establishment of administrative courts.

the supreme administrative court, as the Court of Cassation is the supreme judicial court. The Council of State has the final jurisdiction, with some few exceptions, of questions involving the legality of all acts of the administrative authorities from the president of the republic down to the village mayor, and it may annul those which in its opinion are *ultra vires* and award damages to the individual who has sustained injury in consequence of such acts. In somewhat the same manner as the English courts have built up the common law, the Council of State has developed a large body of administrative case law (*Jurisprudence*) relative to the responsibility of the state and its local governmental agencies for their acts—a responsibility which has been gradually extended until to-day it is almost as absolute as the liability of a private employer of labor for injuries sustained by his employees. Originally established to protect the administrative authorities from interference on the part of the judicial courts, the administrative jurisdiction has become the protector of the individual against the arbitrary and illegal acts of the government and its administrative agents, and it may be safely said that in consequence of the extremely liberal jurisprudence which the Council of State has built up and the solicitude which it has shown for the protection of the individual against the wrongful acts of the government, the individual in France to-day enjoys a greater degree of protection against such acts than exists in any other country. In France, if he suffers an injury at the hands of the state or its administrative agents, he can sue the state in the administrative courts and obtain a pecuniary indemnity, whereas in England and America, where a different rule prevails, he cannot generally sue the state, but must be content with a damage suit against the particular officer or agent who committed the wrong and who is personally responsible. In many cases, such a remedy is ineffective, as where the officer is insolvent and unable to pay the judgment recovered.

In France a suit against the state is a very simple matter; no attorney is necessary; the cost of bringing the case before the Council of State is only a few centimes; and cases are dispatched with remarkable celerity. The remedy thus provided is availed of upon a large scale, and many thousands of cases are decided every year by the Council of State.

In Germany a distinction is made between the state as a natural

person and the state as *Fiskus* or *Fisc*, and the individual who has a claim against it by reason of tortious acts committed by its agents can either sue the agent in the ordinary courts or the state as *Fiskus*. This privilege was definitely provided by a law of May 22, 1910, and by Article 131 of the new constitution of the *Reich* it was extended to apply to the acts of all public servants, national and state. Unlike the French rule the German laws make public servants liable not only for their personal faults but also for acts committed in their official capacity, and the principle of liability extends to military as well as civil servants.

**The Anglo-American System.**—In England and the United States, and in countries generally where English legal institutions have been introduced, the doctrine of administrative jurisdiction, as it is known and practiced on the continent of Europe, is little known. There the doctrine prevails that the state is never liable in tort nor in contract except under the procedure of petition of right. There administrative law is not a separate branch of jurisprudence, and specially constituted administrative courts with jurisdiction over controversies between private individuals and public officials do not exist, at least not in the form in which they are found on the Continent. Disputes between the public authorities and private citizens, like differences between private individuals themselves, are decided by the regular judicial courts and according to the ordinary law of the land. The private citizen who is injured by the action of the public authorities has exactly the same remedies that he would have if the injury had been committed by another private individual, that is, a personal damage suit against the wrong-doing officer. In short, there is one law and one court for the citizen and the public functionary alike.<sup>88</sup>

<sup>88</sup> Nevertheless, both in England and America, there are numerous boards, commissions, and authorities which possess what may not improperly be described as administrative jurisdiction, that is, they determine the claims of employees against employers even when the state is the employer. They are, in fact, often referred to as administrative tribunals; they possess the power of adjudication and determination in many cases, and not infrequently their decisions are conclusive, and hence not subject to review by the courts. Although they are not a part of the judicial system, their procedure when hearing and determining controversies is often characterized by the formalism of the courts of justice. See Bowman, "American Administrative Tribunals," *Pol. Sci. Quar.*, vol. XXI, pp. 60-ff.; Powell, "Conclusiveness of Administrative Declarations in the Federal Govern-

The English (and American) doctrine is that all legal controversies must be decided by the ordinary judicial courts because the theory of the law assumes the supremacy of the latter and the notion of administrative jurisdiction is inconsistent with this theory. The right to sue the state is not admitted except where it is expressly conferred by statute, and when it is conferred it is usually subject to restrictions which often make the action difficult. "In England," observes Dicey, "the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility as any other citizen for every act done without legal justification. The reports abound with cases in which officials have been brought before the courts and made in their personal capacity liable to punishment or to the payment of damages for acts done in their official capacity."<sup>89</sup> "Every act of public authority, no matter by whom or against whom it is directed, is liable to be called in question before an ordinary tribunal, and there is no other means by which its legality can be questioned or established."<sup>90</sup> Dicey emphasizes what he calls "the rule of law," a rule which in England and America makes public servants liable for their acts equally with private individuals, and he contrasts this rule with what he calls the privileged position of public servants in France and Germany. To him the very essence of the *droit administratif* is the "special position" of functionaries in respect to their immunity from responsibility, but in fact this immunity is only one aspect of it.

**Criticism of the Continental System.**—In both Great Britain and the United States there is a prejudice against the Continental system of administrative law and administrative jurisdiction and a popular belief prevails that the administrative judges are not independent, that they render their decisions at the behest of the government,

ment," *Amer. Pol. Sci. Rev.*, vol. I, pp. 583 ff.; Pillbury, "Administrative Tribunals," *Harv. Law Rev.*, vol. XXXVI, pp. 405 and 583 ff.; Beale, "Expansion of American Administrative Law," *Harv. Law Rev.*, vol. XXX (1916-1917), pp. 430 ff.; Ashley, "Local and Central Government," pp. 306 ff.; Redlich and Hurst, "Local Government in England," vol. II, p. 365; and Dickinson, "Administrative Justice and the Supremacy of the Law in the United States" (1927), pp. 5 ff.

<sup>89</sup> *Op. cit.*, p. 180.

<sup>90</sup> Redlich and Hurst, *op. cit.*, vol. II, p. 365.

that they do not decide cases according to fixed rules of law, that public officers are legally irresponsible and protected against damage suits, and the like.<sup>91</sup> This prejudice is, however, based in large part upon misunderstanding, and English and American jurists are not lacking who frankly recognize the obvious merits of the Continental system. Every Dicey has expressed admiration for the skill and ingenuity which the French Council of State has displayed in building up from year to year a vast system of jurisprudence and in devising remedies for the protection of private individuals against the arbitrary and illegal conduct of the administrative authorities, and he admits that the French system does possess merits which Englishmen do not always recognize.

**The Criticism Answered.**—The criticism that the system of administrative law is fundamentally wrong because it is based on the principle of inequality between the official class and the body of private citizens is not well founded. In fact, there is no country in which the individual is on an absolute footing of equality with public officials as to his privileges and immunities or where a public officer can be sued by a private individual without restriction.<sup>92</sup> Dicey's conception that on the Continent public servants are in effect "chartered

<sup>91</sup> See especially the criticism of Dicey in his "Law of the Constitution" (2d ed.), lect. V, and his article "The *Droit Administratif* in Modern French Law," *Law Quar. Rev.*, vol. XVII (1901), pp. 302 ff. But in a later edition of his book Professor Dicey admits that his earlier criticism was based, in part, on misinformation. Compare also Lowell, "Government and Parties in Europe," vol. I, p. 58, who asserts that the administrative judges are largely subject to the control of the government which appoints them and may remove them at will, and that in France there is one law for public officials and another for private citizens. Mr. Lowell, in his more recent work on the "Government of England," vol. II, p. 503, apparently takes a more favorable view of the French administrative courts.

<sup>92</sup> Compare Goodnow, "Comparative Administrative Law," pp. 1112, and Parker, "State and Official Liability," *Hare. Law Rev.* (1906), pp. 335, 337, 339, and the reservations of the English Public Authorities Protection Act of 1893, which places restrictions upon the right of the citizen to bring damage suits against public officials. It may be remarked that in Australia by an Act of 1903 the government of the commonwealth was made liable in tort in every case in which the relation between the commonwealth and its officers is such that according to the ordinary principles of law, the doctrine of *respondeat superior* would apply. By the same act the old procedure of petition of right was abolished and the state was placed in the position of an ordinary litigant. The old doctrine of the irresponsibility of the state for the torts of its agents appears to

libertines" is absurd. As Professor J. H. Morgan of the University of London very accurately remarks, "what administrative law does in France and still more in Germany is not to exempt public officers from responsibility where in this country [England] they would be liable, but to extend that liability to cases where in this country they would be immune."<sup>93</sup> The criticism that the French administrative judges are not independent because, unlike the judges of the judicial courts, they are removable at the pleasure of the government, has no foundation in fact since no one of them has ever been removed since the establishment of the Third Republic and is not likely to be in the future, and there is no known instance in which the government ever attempted to exert pressure upon them to obtain a decision in its favor. In fact, they have shown greater independence than have the judges of the Court of Cassation, and in hundreds of instances they have decided cases in favor of private individuals and against the government when the Court of Cassation would have decided in favor of the government. Their decisions, it may be remarked, are more often based upon considerations of equity, recourse to the Council of State is more simple and less expensive, and whenever the injured individual has a choice he does not hesitate to bring his suit before the Council of State. For this and other reasons, the rôle of guardian of private rights which once belonged to the Court of Cassation has definitely passed to the Council of State, and to-day the French people be losing some of its sacrosanctness also in the United States. By an Act of Congress passed in 1922 the Executive departments of the national government were made liable for damages or loss not exceeding \$1000 sustained by private individuals on account of the negligence of any officer or employee of the government acting within the scope of his legal authority. By an Act of 1921 the government was also made liable for injuries committed by Shipping Board vessels engaged in ordinary commerce and by an Act of 1925 this liability was extended to damages done by *public* vessels. This and other similar legislation is summarized by Borchard in *Amer. Bar. Assoc. Jour.*, vol. XI, p. 498 and in the *Yale Law Jour.*, XXXIV, pp. 32 ff.

<sup>93</sup> See his introduction to Rolinson's "Public Authorities and Legal Liability" (1925), especially pp. 61 ff., where an able defense of the *droit administratif* against the criticism of Dicey and others will be found. Professor Morgan points out that the nature of the *droit administratif* is much misunderstood in England and that in France and Germany the individual is better protected against the arbitrary and illegal conduct of the government than he is in England. Compare also Marriott, *op. cit.*, vol. II, p. 273; Allen, "Bureaucracy Triumphant," *Quar. Rev.*, vol. 240 (1923), p. 247; and Barker, "The Rule of Law," *Political Quarterly*, May, 1914, pp. 117 ff.

look upon it with somewhat the same respect and confidence with which the people of the United States regard their national Supreme Court.<sup>94</sup>

### III. APPOINTMENT, TENURE, AND REMOVAL OF JUDGES

**Qualifications of Judges.**—The peculiar functions of courts of justice are such as to require that the judges should possess in a special degree learning, impartiality, integrity, dignity, and independence of judgment. "Whatever," said Edmund Burke in his "Reflections on the French Revolution," "is supreme in a state, it ought to have, as much as possible, its judicial authority so constituted as not to depend upon it, but in some sort to balance it; it ought to give security to its justice against its power; it ought to make its judicature, as it were, something exterior to the state." If the judges lack wisdom, probity, and freedom of decision, the high purposes for which the judiciary is established cannot be realized. The existence of these necessary qualities depends in large measure upon the method by which the judges are selected, the length of their tenure, and their freedom from control on the part of those who choose them.

**Choice of the Judges; Election by the Legislature.**—The existing methods by which judges are chosen in the different states of the world are the following: (a) election by the legislature; (b) elec-

<sup>94</sup> The literature dealing with Continental, and especially French, administrative law is very extensive. I have discussed the French system in an article entitled "Judicial Control of Administrative and Legislative Acts in France," *Amer. Pol. Sci. Rev.*, vol. IX, pp. 657 ff.; in an article entitled "French Administrative Law," in *Yale Law Jour.*, vol. XXXIII (1924), pp. 597 ff., where numerous citations of the authorities will be found, and in a monograph entitled "La conception Anglo-Américaine du droit administratif" (1929). See also Duguit, "The French Administrative Courts," *Pol. Sci. Quar.*, vol. XXIX (1914), pp. 385 ff.; Lowell, "The Government of England," vol. II, ch. 62; Dicey, "Law of the Constitution" (2d and 3d eds.), lect. V; also his "The *Droit Administratif* in Modern French Law," *Law Quar. Rev.*, vol. XVII (1901), pp. 302 ff.; Wyman, "Principles of Administrative Law" (1903); Goodnow, "Comparative Administrative Law" (1903), vol. I; Sidgwick, "Elements of Politics" (1897), pp. 505-507; Parker, "State and Official Liability," *Harv. Law Rev.*, vol. XIX (1906), pp. 335 ff.; Walton, "The French Administrative Courts," 13 *Ill. Law Rev.* (1918), pp. 63 ff.; Robinson, "Public Authorities and Legal Liability" (1927); Marriott, "The Mechanism of the Modern State" (1927), vol. II, pp. 266 ff. and 296 ff.; and the standard works on the *Droit Administratif* by Barthélémy, Hauriou, Jézé, Laferrrière, Ducrocq, and others. As to German administrative law, see especially Meyer, "Deutsches Verwaltungsrecht."

tion by the people; and (c) appointment by the executive, either absolutely or from a list of nominees presented by the courts, or with the concurrence of an executive council or the upper chamber of the legislature. Choice by the legislature has not commended itself generally to statesmen because it renders the judiciary to a certain extent dependent upon a coördinate department of the government, in violation of the principle of the separation of powers. Furthermore, the system of legislative choice usually means, at least in the United States, nomination by a party caucus and often a parceling out of judicial positions among the political divisions of the state with reference to geographical considerations rather than fitness for the judicial office.<sup>95</sup> In short, as a great jurist has pointed out, it presents "too many occasions and too many temptations for intrigue, party prejudice, and local interest to secure a judiciary best calculated to promote the ends of justice."<sup>96</sup> Choice by the legislature was a favorite method of selection in the American states for a time after the Revolution, a circumstance due to the prevailing jealousy of the executive on the one hand and the distrust of popular election on the other. This system, however, has been abandoned in all the American states but four,<sup>97</sup> and is not followed in any European country except Switzerland, where the judges of the federal tribunal are chosen by the legislative assembly of the Confederation.

**Election by the People.**—The system of popular election of judges was first introduced in France in 1790, for the reason that it was the system most conformable to the theories of popular sovereignty and the separation of powers, two theories which dominated the political thought of the French Revolutionists. In the first elections which took place after the adoption of the system, the results were not disappointing, and a good many able and eminent judges were elected, although only about one sixth of the voters participated in the election. With the establishment of the republic, however, in 1792 and the ascendancy of the radical party to power, the judges elected in 1790 fell under suspicion, they were denounced as aristocrats hostile to the principles of the Revolution, a "purging" of the judiciary was de-

<sup>95</sup> Cf. Baldwin, "The American Judiciary," p. 312.

<sup>96</sup> Kent, "Commentaries," vol. I, p. 292.

<sup>97</sup> Rhode Island, Vermont, South Carolina, and Virginia.

manded, and new elections were ordered by the National Assembly before the expiration of the terms of the judges who had been elected in 1790. The results of the elections which took place in 1793 were deplorable; hardly any of the distinguished sitting magistrates were reelected; only a few of those who were elected were lawyers; and among those who were chosen were engravers, stone cutters, clerks, gardeners, and common laborers. The public confidence in such a magistracy was so low that litigants generally chose to settle their disputes by arbitration.<sup>98</sup> With the advent of Napoleon the system of popular election was abolished, and from then until now there has been little public sentiment in France in favor of a return to a system which was so thoroughly discredited by the results of the election of 1793.<sup>99</sup>

The method of popular election is now the rule in the great majority of the states of the American federal union,<sup>100</sup> though outside of the United States it has made hardly any headway. In Europe and in the British self-governing colonies it is unknown, except occasionally for the election of inferior magistrates,<sup>101</sup> and even in the republics of Latin America, where democratic government has made great advance, at least in theory, popular election of the judges has found little favor. The chief disadvantage of popular election is that it is apt to secure a judiciary at once weak and lacking in independ-

<sup>98</sup> As to the facts see Picot, *La réforme judiciaire*, p. 274; Malepeyre, *Le recrutement de la magistrature*, ch. 3; Douarche, in the *Rev. Pol. et Part.*, vol. 26, p. 138, and my article on "The French Judiciary," *Yale Law Jour.*, vol. XXVI (1917), p. 360.

<sup>99</sup> But in 1883 M. Clemenceau, then leader of the Radical party, advocated popular election as being preferable to the system of appointment by the minister of justice, which he denounced as vicious for the reason that it meant "political" appointments and the consequent impairment of the independence of the judiciary. See Dehesdin *Le recrutement et l'avancement des magistrats*, p. 109. Other well-known French statesmen who advocated popular election were Jules Simon and Jules Favre. In 1883 the Chamber of Deputies passed a bill providing for the popular election of the judges, but upon reconsideration, the chamber rescinded its action. A restricted form of popular election is found in the existing method of choosing the judges of the commercial courts and the members of the councils of *prud'hommes*. The former are elected by men and women who are engaged in business, the latter by employers and employees.

<sup>100</sup> In thirty-eight states the judges of the highest courts are elected by the people.

<sup>101</sup> In the Swiss cantons the judges of the lowest courts (*Amtsgerichten*) are generally elected by the people.

ence. Where such a method prevails the election is usually made from candidates who have been nominated by party conventions or by primary elections following campaigns through the mire of which the judicial ermine must often be dragged. The qualities which distinguish an able and fearless judge are not usually those of the successful politician; and hence judges frequently make poor candidates, and are sometimes defeated by men of less fitness who are better gifted with the art of winning votes. Moreover, the masses of voters do not always possess the discrimination and understanding necessary to appreciate the soundness of judicial opinions, and hence the judge who renders a decision that does not meet the approval of public opinion, however sound it may be in law, can be re-elected only with difficulty if at all. In the judicial history of the American states, where popularly elected judiciaries are most common, instances are not lacking of the defeat of able and distinguished jurists because of unpopular judicial opinions rendered by them.<sup>102</sup> Moreover, the necessity of submitting themselves and their legal opinions at frequent intervals to the judgment of the masses creates in the judges a strong temptation to shape their decisions and indeed their whole judicial conduct in such a way as to meet the approval of those to whom they must look for re-election. No judge should be exposed to the necessity of having to curry popular favor in order to retain his office. As Chancellor Kent will observed, the fittest men are likely to have "too much reservedness of manners and severity of morals to secure an election resting on universal suffrage."<sup>103</sup> It lowers the character of the judiciary, tends to make a politician of the judge, and subjects the judicial mind to a strain which it is not always able to resist.<sup>104</sup> In

<sup>102</sup> For some historical examples of the defeat of able and distinguished judges because of the unpopularity of their judicial opinions, see Baldwin, "American Judiciary," pp. 312-321.

<sup>103</sup> "Commentaries," vol. I, p. 292.

<sup>104</sup> See further on the popular election of judges, Fustein, "Droit constitutionnel" (5th ed.), pp. 515 ff., and Mill, "Representative Government," pp. 253 ff. For a strong argument against a popularly elected judiciary see also Laveleye, "Le gouvernement dans la démocratie," vol. I, pp. 329-333. "La plus mauvaise institution," says Laveleye, "qu'on rencontre aujourd'hui dans la plupart des Etats-Unis, et peut-être la seule qui soit sincèrement mauvaise, est la magistrature élue. Les conséquences n'en sont pas partout également regrettables. Mais elles sont parfois détestables." A judge, says M. Coumoul (*Traité du pouvoir judi-*

some states the evils of the system of popular election have been reduced to some extent by the introduction of non-partisan primaries by which judicial candidates are nominated, and by separating the judicial elections from other elections and holding them at a different date. In a few states also (for example Wisconsin) and in some of the larger cities (notably Chicago and New York) the influence of the bar in recommending suitable candidates to the electors has likewise at times produced favorable results.<sup>105</sup>

**Appointment by the Executive.**—In nearly all countries other than the United States the judges are appointed by the executive, and even in the United States it is the method followed for the selection of the federal judges and in six states for the selection of the state judges.<sup>106</sup> In countries having the cabinet system of government, this

*civile*, p. 305), cannot be impartial in the presence of electors, some of whom are his supporters and others his adversaries.

Dean J. P. Hall, of the University of Chicago Law School, in a very fair and impartial study of the subject, concludes that "what popular elections give us, at best, is an appointment by party leaders, or a popular choice between such appointments," and that "Information collected from a large variety of representative sources of professional opinion seems to indicate that in only three out of the thirty-eight states that elect judges by popular vote are the results considered to be generally satisfactory—these being Maryland, Iowa, and Wisconsin (notably the latter state). In five others, New York, Pennsylvania, Michigan, Minnesota, and Missouri, the system is said to give fair satisfaction, and in all of the rest there are differing grades of professional dissatisfaction with it." See his article, "The Selection, Tenure, and Retirement of Judges," *Jour. Amer. Judicature Soc.*, vol. III (1919), p. 42. See also Hand, "The Elective and Appointive Methods of Selecting Judges," *Proc. Acad. of Pol. Sci.*, vol. III (1913), pp. 130 ff.; Taft, "Popular Government," pp. 193 ff.; A. B. Hall, "Popular Government," pp. 262 ff.; and the symposium of the Commonwealth Club of California on "How Shall Judges Be Chosen?". *Jour. Amer. Judicature Soc.*, vol. III (1919), pp. 75 ff. See also the valuable address of the late Professor Kales entitled "Methods of Selecting and Retiring Judges" (Bul. VI, *Amer. Judicature Soc.*, pp. 29 ff.). Referring to the results of popular election in Chicago, he says the judges are really not elected there by the people, but are appointed by the leaders of the party machines. Professor Kales himself advocated the selection of the judges by a popularly chosen chief justice. A somewhat similar method actually exists in New Jersey, where the chancellor, appointed by the governor, selects his seven colleagues.

<sup>105</sup> As to this see Guthrie and Miller, *Jour. Amer. Judicature Soc.*, August, 1921, pp. 41, 46, and a committee report in *Ibid.*, August, 1924, p. 48.

<sup>106</sup> Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, and Delaware, subject, in all of them, to confirmation by the legislature, the senate or the executive council. The New York Short Ballot Organization has recently proposed

means usually appointment by the minister of justice. In some countries the choice of the executive is limited in the case of the higher judges to the names on a list of nominees proposed by the court in which the vacancy occurs.<sup>107</sup> On the continent of Europe, where the magistracy, like the diplomatic service, is a closed profession, and where appointment to the lower posts is by competitive examination, and promotion is based on seniority, the freedom of the minister of justice in making appointments is somewhat restricted. There also the bench and bar are strictly separated and judicial appointments are confined to the ranks of the magistracy, practicing lawyers rarely ever being chosen to judgeships as is the custom in England and the United States.

The reason why the practice of executive appointment in some form or other has found almost universal favor outside the United States is the belief that the peculiar qualifications which a judge ought to possess are more easily discernible by the chief executive, and that in making his choice he is likely to be less influenced by personal qualities which appeal to the voters generally or by party or sectional considerations which are apt to determine the choice when it is made by the legislature. Moreover, appointment by the executive offers a greater guarantee of independence on the part of the judge than is

that the governor be empowered to recommend the candidates for judgeships and that election by the people be limited to the list of names which he proposes. See its pamphlet (undated) entitled "Proposal for Judges by Governor's Recommendation."

<sup>107</sup> In Belgium the judges of the Court of Cassation must be appointed from two lists of nominees, each containing twice as many names as there are vacancies to be filled, one presented by the court itself, the other by the senate. This system represents a combination of coöptation, election, and appointment. In principle, it has much to commend it, and it has been advocated in France by various jurists and commissions on judicial reform. See my article on "The French Judiciary," cited above, p. 363. Under the new constitution of Chile, 1925 (Art. 83), the judges are chosen by the president of the republic from a list of nominees proposed by the court itself. The same principle is found in the new constitutions of Austria (Art. 86) and of Yugoslavia (Art. 111).

In France it is the custom, when a vacancy occurs on the bench, for the president of the court and the state's attorney to propose the names of several persons to the minister of justice for his consideration. Generally, he appoints one of the persons thus recommended, but sometimes, for political reasons, he prefers to follow the recommendation of a deputy, especially if he is an influential member of the minister's party.

possible under the system of popular choice when his reëlection may be dependent upon the popularity of his decisions.<sup>108</sup>

**The Method of Executive Appointment Criticized.**—Nevertheless, no one will contend that the method of executive appointment is perfect. Instances are by no means lacking in the states of the American Union where appointments were made as rewards for party services or because of personal favoritism, and the requirement that the appointment should be approved by the state senate or the executive council did not always serve as an effective check in preventing them.

In France, where the system of executive appointment has existed since the year 1800, there has been much complaint that appointments to and promotions in the magistrature, both of which functions are in fact exercised by the minister of justice, are determined in large part by political considerations, that is, the minister is governed too frequently by the recommendations of influential deputies. M. Briand, when minister of justice in 1912, himself declared that the judges had become the prey of the politicians.<sup>109</sup>

<sup>108</sup> Dean Hall in his study, cited above, thus evaluates the system of appointment by the executive: "Of all the methods of selecting judges, of which we have actually had considerable experience in this country, that of appointment by the executive has unquestionably produced the ablest and most satisfactory courts. Of the six states now pursuing this method of choice, the testimony in Massachusetts, New Jersey, and Delaware is practically unanimous that the judges are usually admirably fitted for their tasks, and enjoy in the highest degree public and professional confidence in their ability and impartiality. The same praise is accorded to the Supreme Court of the United States, similarly chosen. In no elective state do favorable conditions prevail. In three other appointive states, Connecticut, Maine, and New Hampshire, the judges, while not usually among the ablest members of the bar, give very general satisfaction, ranking in this respect with the exceptional elective states of Wisconsin, Maryland, and Iowa, already mentioned. Probably the lower federal courts would also fall in this class."

<sup>109</sup> As to this see my article on "The French Judiciary" (p. 363), cited above. Compare also the trenchant criticism by M. Faguet in his "The Dread of Responsibility," where he argues that the old system of the sale of judgeships (*venalité*) was superior to the present method of recruiting the magistrate in France (p. 13). He proposes that the Court of Cassation be elected by the entire body of judges throughout France, and that this court be empowered to fill its own vacancies (p. 104). In France, where the judicial service is a career and where the magistrature is hierarchically organized into grades and classes and where promotions in the service rest with the minister of justice, his control over the judiciary is especially potent. In England, on the other hand, where judges are very seldom promoted from one court to another, the evil of the French

The ideal system of selecting judges has not yet been discovered. Perhaps the system of executive appointment from lists of nominees made by the court in which the vacancy is to be filled possesses merits which no other system has.

**The Judicial Tenure.**—In regard to the tenure of the judges we find the same diversity of opinion and practice. Most of the original thirteen states of America, in their first constitutions, established a good-behavior tenure for the higher judges, and this rule was adopted by the national constitution for the federal judges. The substitution of short tenures, however, became a part of the democratic movement in the early nineteenth century, and in the course of time all the American states except three abandoned the good-behavior principle for limited terms.<sup>110</sup> These terms range from two years, which is the rule in Vermont, to twenty-one years, which is the term in Pennsylvania, the average being from six to nine years.<sup>111</sup> In Europe, Switzerland is the only country in which the tenure of the higher judges is limited to a definite term, the period being six years for the members of the federal tribunal. In Latin America, Mexico is the only important republic in which the good-behavior tenure is lacking, the term of the supreme judicature in that country being six years. Outside the United States, therefore, the good-behavior principle is practically universal. "The standard of good behavior for the continuance in office of the judicial magistracy," said Hamilton, "is certainly one of the most valuable of the modern improvements in

method does not exist. It may also be remarked that in England appointments to the bench are never dictated or influenced by members of parliament.

<sup>110</sup> The exceptions are Massachusetts, New Hampshire, and Rhode Island, where the judges are appointed for good behavior or until they have reached the age of 70 years.

<sup>111</sup> In a goodly number of American states where the terms of the judges are relatively short, it is the practice to reappoint or reflect the sitting judges unless there are substantial reasons for not doing so. Thus in New Jersey, where the term of the higher judges is only seven years, in Vermont where it is only two years, and in Delaware where it is twelve years, the practice of reappointment is so general that the tenure in effect amounts to good behavior. It is largely the same in Connecticut, Maine, Wisconsin, and some other states. By this means the advantages of what is in effect life tenure are secured, and at the same time its possible dangers are avoided. On the whole subject so far as it relates to American practice, see Hall's article cited; Carpenter, "Judicial Tenure in the United States" (1918); and Taft, "Popular Government" (1918), ch. 8.

the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince ; in a republic, it is no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.<sup>112</sup> Finally, as Hamilton showed, a good-behavior tenure is necessary to secure the experience and knowledge of judicial precedent which constitutes one of the most important sources of strength in the judicial office. In the course of a long judicial career marked by laborious study and constant application, the judge acquires a familiarity with the precedents which obviously cannot be gained by one whose tenure is limited to a brief period.

**Removal of Judges.**—In all states provision must be made for the removal of corrupt and inefficient magistrates ; for the continuance in office, and especially for life, of an incapable or corrupt judge would be intolerable. The English judges in earlier times held their offices at the royal pleasure, but this proved to be a dangerous power to vest in the executive, because it made the judiciary subservient to the crown, especially in state trials, and gave the king a control over the administration of justice at once dangerous to private rights and subversive of the liberties of the people.<sup>113</sup> In the time of Lord Coke the barons of the exchequer were given a good-behavior tenure ; and during the reign of Charles II the same tenure was created for the common-law judges, though the crown retained until after the revolution of 1688 the right to prescribe what tenure the judges should have. Finally, by an act of Parliament passed in the thirteenth year of the reign of William III, the commissions of the judges were made to run during good behavior, and they were forbidden to be removed by the crown except upon an address of both houses of parliament.

In the United States the most common mode of removal is by impeachment, that is, through the preferment of charges by one chamber of the legislature, usually the lower, and trial by the other. The chief objections to this procedure are its cumbersomeness and the danger that the legislature may employ its power of removal for party purposes, but

<sup>112</sup> *The Federalist*, No. 78.

<sup>113</sup> See as to this De Lolme, "Constitutional History of England," bk. II, ch. 16 ; Kent, vol. I, pp. 293-294 ; Story, vol. II, sec. 1608.

the latter danger is largely eliminated by the provision that an extraordinary majority of the trial chamber shall be required to remove. In twelve states provision is made for removal by the legislature, and in nine states the governor is empowered to make removals upon address by the legislature, following the English practice.

Recently the method of recall by popular election has found many advocates in the United States, and it has actually been adopted by constitutional amendment in seven states (Arizona, California, Colorado, Kansas, Nevada, North Dakota, and Oregon).<sup>114</sup> This mode of removing judges has, however, been severely condemned by American jurists generally as destructive of the independence and dignity of the judiciary, and there seems little likelihood that it will ever find general favor or acceptance.<sup>115</sup>

In the states of continental Europe generally a wholly different method for the removal of the judges prevails. There, judges may be removed only by the court of which they are members, or by the supreme court sitting as a disciplinary tribunal, and after a regular trial, and for reasons expressly stated in the laws.<sup>116</sup> Most of the Continental

<sup>114</sup> As to the movement for the recall of judges and the literature relating to it, see Merriam, "American Political Ideas" (1920), pp. 194 ff.

<sup>115</sup> The system of popular recall is criticized by Taft, "Popular Government," pp. 80 ff.; by Butler, "Why Should We Change Our Form of Government?" pp. 48 ff.; by Root, "Experiments in Government," pp. 68 ff.; by Hall, "Popular Government," ch. 9; and by the American Bar Association, which appointed a committee to conduct a propaganda against it.

<sup>116</sup> See the constitution of Germany, Art. 104; of Austria, Art. 88; of Czechoslovakia, Art. 99; of Yugoslavia, Art. 112; of Poland, Art. 78; of Finland, Art. 59; of Belgium, Art. 100; and as to France see my article on "The French Judiciary," pp. 373 ff., cited above. In France the principle of irremovability by the government does not, however, apply to the judges of the administrative courts, nor to the justices of the peace, nor to the colonial judges. They may, therefore, be dismissed by the government at will, but in fact they rarely are. There has been no case of the dismissal of an administrative judge since the establishment of the Third Republic. It is necessary to remark, however, that while the principle of irremovability in the case of the judges of the regular courts has been an established rule of French public law since Napoleon's day, there has usually been an *épuration* of the magistracy following the advent of every new constitutional régime. Thus in 1807 Napoleon "purged" the magistracy of the judges who were believed to be hostile to him, the government of Louis Philippe did likewise in 1830, so did Napoleon III in 1852, and in 1883 under the guise of a reorganization measure, the republicans got rid of a large number of judges who had been appointed by MacMahon. As to the details relative to this regrettable chapter of French history, see my article cited, pp. 367 ff. Only a

constitutions or organic acts relative to the judiciary also provide that a judge cannot be transferred from one judicial post to another without his consent, except by decision of the court itself.<sup>116</sup> In a few countries, however (e.g., Austria and Czechoslovakia), the guarantee against irremovability and transfers is qualified by the reservation that removals or transfers may be made in case of the reorganization of the judicial system. In Germany, where transfers are made in such a case, the judge must be assigned to another post of equal rank and pay and receive an allowance to cover the cost of changing his residence. Provisions such as these, coupled with life tenure, insure an almost absolute independence of the judges. On the whole, it must be admitted that throughout Europe the safeguards that have been adopted to insure an independent judiciary are more effective than in the United States where the practice of popular election and limited tenures generally prevails in the individual States of the Union.

few cases have occurred of removals by the Court of Cassation sitting as superior disciplinary council, and they have been those of royalist judges guilty of offensive attacks upon the republic.

<sup>117</sup> In Italy the independence of the judiciary is weakened by the power of the executive to assign the judges to their stations. Thus magistrate who refuse to show the desired subserviency to the executive may be "reassigned in the interest of the service" and sent to a less desirable judicial station in another part of the country. Frequent complaints have been made of the arbitrary exercise of this power. See Lowell, "Governments and Parties in Europe," vol. I, p. 177.

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